LAW AS FACT

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BY

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To my Wife

PREFACE

When this book was going to the press news arrived of the death of Professor Axel Hägerström. He was my revered and beloved master. I cannot make any attempt here to describe the nature and extent of his philosophical research, which will certainly in time be more widely known and appreciated than it is now. For my personal part it is enough to say that my endeavour to treat law as fact could not have been made without the basis supplied by his work.

I am also deeply ingratiated to Professor Vilhelm Lundstedt, both for the inspiration he has given me and for the enlightenment I have got from his many-sided investigations on the law. I have freely used arguments drawn from his writings as well as from Professor Hägerström's.

My wife, besides stimulating my work with her untiring interest, has been of invaluable help to me through much clarification on questions of psychology.

Thanks are also due to Dr. Asta Kihlbom, Assistant Professor in the University of Lund, and Mr. A. H. King, B. A., English Lector at the same University, for valuable assistance in correcting the manuscript and revising the proofs.

Lund, Sweden, July 1939.

Karl Olivecrona.

INTRODUCTION

THE BINDING FORCE OF THE LAW

The most general definition of law seems to be that law is a body of rules, *binding* on the members of a community. Vague as it is, we may take this definition as a starting point for our investigation into the true nature of the law. It contains at least one element which, beyond doubt, is common to practically all those who have treated the subject. This is the assumption that the law is *binding*. Leaving aside for the time being the question how a rule is to be defined, we will first of all ask what is meant by the binding force of the law and try to decide whether the binding force is a reality or not.

This means attacking the prevalent notions about the law at their very root. The binding force is deemed to be wholly essential to the law. A law without binding force seems to be inconceivable. According to current opinion such a law would be no true law at all. To many

people, therefore, the mere calling in question of the binding force is absurd.

The point is, however, regarded in another light too. Very often criticism of this kind is believed to be directed against the law itself. It is therefore met with fierce resistance, being branded as an attempt to promote anarchy. But this attitude is highly suspicious.

If the binding force is a reality it is not affected by any theories. The law will then continue to bind, whatever is written about it in books. Therefore, under this supposition, no theory can be an attack on the law itself, but only on the previous theories on the subject. It might be added that, if these theories were sound, the attack would not be dangerous, as the truth would be bound to emerge in the long run. If, on the other hand, the binding force were discovered to be an illusion, it would seem to be highly important that this illusion should be dispelled as soon as possible, since any general misconception concerning the true nature of the law must be presumed to be detrimental to social science and to social education.

The resistance against any criticism of the binding force of the law is only to be explained if the criticism impinges on a cherished *belief* that is deemed necessary to the maintenance of the law. Under this hypothesis only is it possible

to understand why the idea of the binding force is defended at all costs, regardless of truth, and the fierceness of the resistance. There is no doubt that such a belief is widely held.

We cannot, however, call a stop to science because of this belief. The belief itself must be investigated from the standpoint of truth and its actual rôle in the maintenance of the law scrutinized without any preconceptions. Suppose that the binding force is really an illusion. It cannot then be taken for granted that the continued existence of this particular illusion is necessary to keep up law and order. We are very apt to overrate the importance of our own ideas. No reliable knowledge of the actual position can be attained without a comprehensive analysis of the various psychological facts behind the law. But such an analysis must in its turn presuppose a true picture of the law itself. We can hardly be expected fully to grasp the forces which maintain the law if we do not thoroughly know what it is that is maintained.

The first thing to do, therefore, is to investigate the nature of the law in a scientific way. But this cannot be done without calling its binding force in question. Otherwise we should start with a settled belief concerning the subject to be investigated.

The law, it is true, might be said to be binding

on the members of the community in a very real sense. Everybody must on the whole keep within certain limits if he wants to avoid disaster. He must pay his debts, he must abstain from damaging or appropriating other people's property, he must avoid doing them bodily harm etc. Anyone who chooses to transgress the limits set by the law exposes himself to a considerable risk, as he is likely to be subjected to punishment or damages. To such sanctions are added other reactions from his social surroundings, involving the loss of reputation, difficulties in finding a livelihood and so on. In the end, a total disregard for the rules of law will almost certainly lead to destruction.

Thus the rules of law actually have a firm grip over us. But this is not what is meant by their binding force. The "binding force" is definitely not the same thing as the fact that unpleasant consequences are likely to occur in case of unlawful behaviour. If this were what we mean by the binding force, we might as well say that there is a binding rule forbidding people to put their hands into the fire. The consequences of such an act are most unpleasant. But we are not on that account deemed to be *bound* to avoid the act. It is not said to be a duty to keep away from the fire. It is in our own inter-

est, only, to do so. But the law is thought to be "binding" regardless of our own interests.

It is true that, on the whole, our interests compel us to observe the law, but that is a secondary fact. According to current theories a sanction is inflicted *because* a binding rule has been broken. The binding force is thus conceived as something prior to the sanction. The nature of the binding force cannot, therefore, be described by the fact that we incur sanctions in case of transgression. Nor can it be defined by means of the rules which prescribe sanctions. A "binding" rule says e. g.: you shall not steal. Another rule says: if you break this rule and steal, you will be punished. The meaning of the idea that the first rule is binding can obviously not be explained by pointing out that there is another rule (also binding!), which orders punishment in case of violation.

Further it will be noted that the binding force of the law is represented as being absolute, unconditional. But the actual bonds in which we are held by the law, are of a relative nature. It depends on the efficiency of the social organisation and other circumstances if the sanctions are applied or not. There will always be loopholes, even if the existing organisation should be the

most efficient that can possibly be devised. But the binding force of the law is not affected by these imperfections. The law is regarded as binding on everyone irrespective of the actual hold that the law has over him. Obviously, it is not said that the law ceases to be binding on a person because he finds himself in a position to violate it with impunity!

The binding force of the law, therefore, must be something different from the fact that we expose ourselves to the risk of sanctions when we overstep certain limits drawn up by the law. How then is it to be explained? Perhaps it might be suggested that we have a certain *feeling* of being bound by the law, and that this feeling constitutes an actual hindrance to law-breaking. In fact, every normal person is prevented by such inhibitions from doing a great many things which are forbidden in the law. But it would be entirely wrong to identify the binding force with the existence of those inhibitions. The feeling of being bound and the resulting inhibition must be sharply distinguished from the binding force itself. Nobody maintains that the law does not bind people who do not feel bound by it. This would mean saying that the law is not binding on criminals but only on orderly citizens!

What then is the binding force of law? It is obviously not a fact. It has no place in the real

world, the world of time and space. In actual social life, which is the sphere where the law should be found, we may observe a multitude of facts determining people's actions, among them the rules of law. But their effect is always relative and conditioned by other elements in the situation. The absolute binding force of the law eludes every attempt to give it a place in the social context.

This is no new discovery, though usually it is not put quite so bluntly. The jurists and the philosophers are well aware of the fact that the binding force of the law does not belong to the surrounding world of time and space, the natural world. The obvious conclusion should be that the binding force exists in imagination only. But so deep-rooted is the belief in its reality that such an idea has hardly ever been expressed. On the contrary, the binding force in the traditional sense is retained as a basic assumption in every current theory.

The consequence is that the law must be conceived as standing above the facts of life. This means in the last instance that the law does not belong to the world of time and space. It must have a realm of its own, outside the actual world. But this is absurd.

There is one very simple reason why a law outside the natural world is unconceivable. The

law must necessarily be put in some relation to phenomena in this world. But nothing can be put in any relation to phenomena in the world of time and space without itself belonging to time and space. Therefore all the talk of a law, which in some mysterious way stands above the facts of life, is self-contradictory. It makes no sense at all.

It we discard the superstitious idea that the law emanates from a god, it is obvious that every rule of law is a creation of men. The rules have always been established through legislation, or in some other way, by ordinary people of flesh and blood. In other words, they are produced by natural causes. On the other hand, they have natural effects in that they exert a pressure on the members of the community. The rules of law are a natural cause — among others — of the actions of the judges in cases of litigation as well as of the behaviour in general of people in relation to each other. The law-givers and other people who are in a position to lay down rules of law may actually influence the conduct of the members of the community. But that is certainly all they can do.

We can never escape the conclusion that the law is a link in the chain of cause and effect. It has, therefore, a place among the facts of the world of time and space. But then it cannot

at the same time belong also to another world. The law cannot on the one hand be a fact (which it undoubtedly is) with natural causes and natural effects and on the other hand something outside the chain of causes and effects. To maintain the contrary involves pure superstition. The meaning must be — if there is any real meaning at all — that the law is endowed with a supernatural power. Otherwise the words are empty, being used according to a secular habit without a real thought behind them.

Every attempt to maintain scientifically that law is binding in another sense than that of actually exerting a pressure on the population necessarily leads to absurdities and contradictions. Here, therefore, is the dividing-line between realism and metaphysics, between scientific method and mysticism in the explanation of the law. The "binding force" of the law is a reality merely as an idea in human minds. There is nothing in the outside world which corresponds to this idea.

Some philosophers have clearly realised the necessity to place law outside the world of time and space when it is conceived as binding in the traditional sense. The most persistent and logical effort in this direction is perhaps that made by Hans Kelsen in his endeavour to build up a "pure theory of law". The aim is to de-

monstrate how law should be treated without being mixed up with elements alien to its true nature. This means in particular that law must be sharply distinguished on the one hand from ethics, on the other hand from the facts of social life and the natural world generally. Kelsen deserves credit because he has stated in a most uncompromising way the consequences of assuming a binding force of the law. Where others have shrunk back he has had the courage to go forward without fear of paradox. His theory, therefore, provides an excellent illustration of what has been said above of the necessity, when starting from the belief in the binding force, to make a distinction between law and the facts of the actual world.

A legal rule, according to Kelsen, has a peculiar effect in that it puts two facts, e. g. a crime and its punishment, in a connexion which is different from that of cause and effect. The connexion is so described that the one fact *ought* to follow upon the other though it does not necessarily do so in actual fact. The punishment ought to follow on the crime, though it does not always follow. Now this "ought" is not, in Kelsen's theory, a mere expression in the law or jurisprudence. It signifies an objective connexion that has been established by the law.

Kelsen says in his own words: "The law of

nature (meaning causality) runs: If A is, then B must be. The legal rule says: If A is, then B ought to be ..... It is evident that this connexion is not that of cause and effect. Punishment does not follow upon a delict as effect upon a cause. The legislator relates the two circumstances in a fashion wholly different from causality. Wholly different, yet a connexion as unshakeable as causality. For in the legal system the punishment follows always and invariably on the delict even when in fact, for some reason or other, it fails of execution. Even though it does not so fail, it still does not stand to the delict in the relation of effect to cause."

Here we have the whole theory in a nutshell. Everything in it turns on the assumption of this connexion as something objectively present beside the connexion of cause and effect. This is the ultimate reason why law "must be distinguished in the plainest possible manner from nature", why it has a realm of its own, "the world of the Ought".

Now it is evident that there is in fact a relation of cause and effect between the crime and the punishment. Why is the murderer brought to trial if not because he is suspected of having killed another person? Why is he suspected? Is it not in most cases the fact that he has actually committed the crime he is accused of? When

this fact has been proved in the way required by the law of procedure, the judge metes out his sentence. Obviously this sentence is caused by the deed on the one hand and the contents of the law on the other hand, since the judge is influenced by these facts in giving judgment. I range the contents of the law expressly among the facts. The words printed in the law-books are certainly facts and so are the ideas evoked in the mind of the reader by these words. They are among the principal causes of the action of the judge in giving sentence. If the laws did not have this effect, people might as well give up legislating as an unnecessary waste of time. There are, of course, other causes too for the action of the judge, such as his temperament, his education, his interests etc. But the important point that must be stressed here is that both the crime and the law are *causes* of the punishment.

Kelsen has not the slightest interest for this relation of cause and effect in his theory of law, nay more, he expressly denies that the law belongs to this context. He admits, it is true, that there are certain causes for the action of the judge. But this is only a question of "certain parallel processes in nature". It does not concern the law itself, because law has only to do with the relation of "ought".

It should, however, be evident that the talk about this mystical relation is merely an empty phrase. "The legislator relates the two circumstances in a fashion wholly different from causality. Wholly different, yet a connexion as unshakeable as causality"! How on earth can our law-givers at their very prosaic meetings manage to establish such relations? Kelsen is hard put to it to find an answer to this question. It is impossible to explain rationally how facts in the actual world can produce effects in the wholly different "world of the Ought". At one time Kelsen bluntly declared that this was in fact "the Great Mystery". That is to state the matter plainly. A mystery it is and a mystery it will remain for ever.

The sole basis for the nebulous words about the supernatural relation of the "ought" is a verbal expression in conjunction with certain emotions. The word "ought" and the like are imperative expressions which are used in order to impress a certain behaviour on people. It is sheer nonsense to say that they signify a reality. Their sole function is to work on the minds of people, directing them to do this or that or to refrain from something else — not to communicate knowledge about the state of things. By means of such expressions the law-givers are able to influence the conduct of state

officials and of the public in general. The laws are therefore links in the chain of cause and effect.

In the classical theory of "natural law", which was predominant during the 17th and 18th centuries, a supernatural basis of law was more or less openly proclaimed. The binding force of the positive law (statutes and traditional law) was said to derive from the eternal and immutable "law of nature", usually by means of a contract. The members of the community were, according to this theory, bound by the enactments of the sovereign law-giver because they were bound by the social contract. The binding force of this contract was based in its turn on a rule of the law of nature, laying down that contracts should be adhered to *(pacta esse servanda)*. In Grotius the law of nature is in its essence commands of God. Reason, he says, indicates what is morally bad or good and *accordingly* either prohibited or commanded by the creator of the universe. Thus the obligation is derived from God.

In the last hundred years law has most often been defined as the *will of the state.* This is in fact an attempt to find a place for it in the world of time and space without giving up its binding force. The will of the state is supposed to be a fact in the actual world. It is regarded as an

advance from the standpoint of "natural law" that thus the law is not thought to reside in immutable principles without foundation in a historical process. Instead the law is represented as being based on the will of a particular state and as existing only so long as this will is maintained. The will is somehow thought to be binding upon the members of the community.

In this theory the written laws are mere expressions or outward signs of the will of the state. The substance of the law is the *will* and nothing else. It is important to stress that this is the meaning of the theory, however absurd it may sound. The theory must not be interpreted as signifying only that the laws are *established* through acts of law-giving, as e. g. voting in parliaments etc. Such a statement would be a mere platitude and, in addition, it would tell us nothing about the nature of the law. It would only indicate how the law is brought into being, not what it *is*. No, the meaning is that the law *consists* of the *will of the state.*

Actually it should be enough thus bluntly to state the meaning of the theory in clear words in order to demonstrate its absurdity. In any case a lengthy refutation is not necessary here since it has been made by other authors. The "will of the state" is pure imagination, since

there exists no superhuman will, belonging to an entity above the particular persons composing the state. Only human beings have a will and each has a will of his own. This simple fact should be obvious.

On the other hand it is impossible to define law as the content of the will of any particular person or persons. Those who for the moment are in power (as kings, presidents, members of the government or of parliament) have many other things to do than going about *willing* what is said in the laws. They do not even *know* more than a certain limited part of the law, often quite a small part. Very likely they desire that the law should be enforced, and they play their part in this regard. But this desire and their actions in this connexion do not imply that the law is their will. They only strive to fill their function in the organisation of the state and they are anxious that law and order should be maintained. The difference in their relation to the law from that of the general public is only that they have access to the machinery of legislation.

It would be still more absurd, if possible, to suggest that the law is the contents of the will of the people. Surely every single individual has nothing to do but to conform his behaviour to the law if he wants to avoid the sanctions.

He may be content or not with the law: it is nevertheless enforced against him. A general discontent, it is true, usually brings about an alteration of the law in time, but that is a different matter. The law cannot be scientifically described as the will of the people on the ground only that in the long run the prevalent desires of the people put their stamp on it.

I do not propose to put forward here a comprehensive criticism of the theories on the nature of the law. If this were attempted, even in a restricted sense, we should have to make a long and arduous journey before arriving at our proper subject, law as fact. I want to go straight to this question and treat directly the facts of social life. If in this way we get a coherent explanation, without contradictions, of those facts which are covered by the expression "law", our task is fulfilled. Anyone who asserts that there is something more in the law, something of another order of things than the "mere" facts, will have to take on himself the burden of proof.

The study cannot begin with a definition of law. It is impossible to start from such a definition since this would mean a *petitio principii*. Before a definition can be reached, the facts must be analysed. The method will be simply to take up such facts as are covered by the expression rules of law. No assumption is made

from the beginning concerning their nature. We only use the word "law" so to say as a stick to point to the object of the investigation.

A qualification must be made, however, concerning the object. There is nothing to warrant that the facts covered by the term"law"are always of the same nature. Even without any special inquiry it seems highly improbable that e. g. the Law of Nations or the law of the Catholic Church are of the same nature as the internal law of a modern state. The inquiry will be limited to this latter kind of law when nothing is expressly said to the contrary.

The study will consist of four parts. (I) First we shall examine the content and the form of a rule of law. (II) Then we proceed to inquire how such rules are made parts of the social machinery through law-giving and in other ways. (III) After this, the ideas of rights and duties and their connexion with the legal system will be the subject of a special investigation. (IV) Lastly, the relations between law and force will be considered.

I do not regard it as necessary to formulate a definition of law. A description and an analysis of the facts is all that will be attempted.

Before entering on this task, I should like to make a final remark concerning my purpose. The facts which will be treated here are plain to

everybody's eyes. What I want to do is chiefly to treat the facts as facts. My purpose is to reduce our picture of the law in order to make it tally with existing objective reality, rather than to introduce new material about the law. It is of the first importance to place the most elementary and well-known facts about the law in their proper context without letting the metaphysical conceptions creep in time and again. But if this is to be done, the facts must be carefully analysed even when, on the face of it, their purport seems to be perfectly simple and obvious. The following pages should be regarded as a modest contribution to this end.

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I

THE NATURE OF A RULE OF LAW

Every rule of law is, of course, concerned with people's conduct. The purpose of the rule is always to influence their actions in some way or other. There is nothing else that the law-givers could be conceived as aiming at. From this angle the content and the form of the rules of law should be viewed.

The content of a rule of law.

In order to fulfil their purpose the law-givers set up patterns of behaviour for those whom they want to influence. In their imagination they conceive a picture of the conduct desired which is then conveyed to the people concerned in some suitable way. The law lays down e. g. that a murderer should be condemned to death. Here the final action of the judge in a trial for murder is pictured. A pattern of behaviour is put immediately before his eyes. The imagined action which is set forth in the law is intended to serve

him as a model for his own action when he finds himself in a situation corresponding to that which is imagined in the law, viz. that a person is brought before him accused of murder according to the rules of procedure, and found to have committed the crime in question.

Thus the content of a rule of law of this type is an idea of an imaginary action by a judge in an imaginary situation. We might add at once, however, that a rule of law is never intended to be regarded in isolation. It is always connected with other rules and its meaning does not emerge unless this connexion is observed. The rule about condemning the murderer to death is not only related to the law of procedure where the actions leading up to the judgment are pictured. Many more rules come into play. The accused must have attained a certain age, he must have been of sound mind when he committed the crime, and so on. Thus the picture of the imagined situation in which judgment should be given is very rich in detail. Many rules must be put together in order to make complete the picture of the situation and of the action desired.

With this qualification the content of the rules of law may be defined as *ideas of imaginary actions by people* (e. g. judges) *in imaginary situations*. The application of the law consists in

taking these imaginary actions as models for actual conduct when the corresponding situations arise in real life.

To no small extent the actual purport of the rules is obscured by the technique of law-giving, which is based on conceptions such as rights, duties and their ancillaries. On the face of it these rules do not at all, or only partly, treat the *actions* of people. Primarily they seem to be concerned with the *existence* of rights, duties, juridical persons, and so on. A legal rule says, e. g., that property is acquired in such or such a way, e. g., through the death of another person. Nothing is here directly said about any action by anybody. It is obvious, however, that ultimately the rules are always concerned with the conduct of people. They can have no other reasonable meaning. Their sole function is to contribute to the picture of the *situations* in which the actions desired should be undertaken and to the pictures of these *actions*. How this is done will be discussed at a later stage. It would complicate the exposition to take up the question about the technique already at this point.

The form of a rule of law.

So much for the present about the *content* of the rules. We now turn our attention to the

form in which it is expressed. The law-givers do not, of course, use the narrative form in laying down the rules. Their aim is not to tell us which are the ideas in their minds but to impress a certain behaviour on people. To this end the imaginary actions are put before the eyes of people in such a way as to call up the idea that this line of action must, unconditionally, be followed. Therefore the *imperative* form is used.

We will now leave aside for the time being the question of the conditions required for the imperative form to be psychologically effective. This vast problem will, in fact, only be referred to very briefly in this book, which is not intended as a work on psychology. What we have to do now is to look more closely at the imperative form itself and see how it is used. Some very important misconceptions have arisen from lack of clarity on this point.

The imperative form of the rules has been the cause of the wide-spread theory that the law consists of *commands* by the state. This theory has been mixed up with the theory, already referred to, that the law is the *will* of the state. The supposed commands are represented as expressions or outward signs of the will, through which its contents are made known.

Here two important mistakes lie concealed.

The first concerns the true nature of a command. The second concerns the rôle of the state in this connexion. In order to make the real significance of the rules of law perfectly clear these two points must be elucidated.

A command is not a declaration of the will.

The assumption that a command is an expression or a declaration of the will of the person who commands is very general and very old. Hobbes says e. g.: "A command consisteth in declaration or manifestation of the will of him that commandeth". The same idea is expressed by modern authors and it is positively asserted that the command is addressed to the intellect of the receiver. He is said to be instructed about the content of the will of him who commands.

This is a very grave fallacy. Two things must be kept apart here. From the fact that a command has been given it is possible to draw a conclusion about the will of the person who commands. But this does not imply that the command itself is a declaration of his will. If we see a man light a match and hold it to his pipe we can conclude that he wants to smoke. But his gesture is not meant to inform us of this intention.

If a command were really a declaration of the

will, it could be formulated as an assertion to this effect without any alteration of the meaning. But this is impossible. Compare the following two utterances to a child, "Blow your nose!" and, "It is a fact that I want you to blow your nose". The *effect* of the latter may be the same as that of the former, because the child knows that the grown-up person has some means of enforcing his will. But the *meaning* of the two sentences is not identical. In the first case we have no statement of a fact at all. Instead we have an utterance that is specifically adapted to the purpose of producing an action by the person addressed and to that purpose only. It is not intended to impart knowledge but to influence the will. In the latter case, on the contrary, we have a statement about a fact, primarily intended to convey knowledge.

Thus a command must be sharply distinguished from a statement or declaration of the will of the speaker. A command is an act through which one person seeks to influence the will of another. This may be done through words or signs or perhaps by a determined look only. It is characteristic of the command that the influence on the will is not attained through any appeal to things that constitute values for the receiver of the command. The command may be supported and strengthened by a threat or

by a promise. But this is something secondary. The command as such does not contain any reference to values. It works directly on the will. In order to do this the act must have a suggestive character. Whether words or other means are used, the purpose is obviously suggestion.

From what has now been said it is clear that there is a good deal of confused thinking behind the identification of the assertions that law is the will of the state and that it consists of the commands of the state. In fact these two assertions are incompatible. If the rules were really declarations of the "will of the state", they could not be commands of the state, since a command is not a declaration of the will.

The confusion seems, however, to be almost general. It has undoubtedly contributed to keep both theories alive. The contents of both have been obscured and they have therefore been less exposed to criticism. If only the meaning of either theory is clearly stated, criticism is very easy. In fact, both theories are patently absurd when their exact meaning is realised. This has already been shown for the first theory, that which maintains that law is the will of the state. We will now turn to the second theory, the "imperative" theory.

A rule of law is not a command in the proper sense.

The imperative theory has been so thoroughly criticised by previous authors that there is no need to discuss it at length here. We have only to confront the theory with obvious social facts. Its innermost meaning is to range law among the facts of the actual world. The commands, if there be any commands, are of course natural facts. The theory, therefore, has the aim we pursue in this treatise. Only, the facts are misinterpreted when the rules of law are said to be commands in the proper sense of the word.

A command presupposes one person who commands and another to whom the command is addressed. In true appreciation of this fact, the imperative theory has endeavoured to point out from whom the "commands" emanate. Generally this has not been said to be any single individual. It would be hard indeed to maintain that the immense bulk of rules contained in the law of a modern state are the commands of any single human being. Such a being would undoubtedly require superhuman qualities. It is for this reason that the commands are ascribed to the *state*.

It is, however, impossible to maintain that the

"state" properly speaking could issue commands. The state is an organisation. But an organisation cannot, as such, be said to command. If this is maintained, the expression is at best a loose one for the fact that commands are given by individuals active within the organisation. Only in this sense is the statement at all reasonable.

The imperative theory, therefore, is tenable as an explanation of the law only if it can be shown that the rules of law are the commands of some person, or persons, belonging to the state organisation. But this is clearly impossible. The machinery of the state is run by an ever-changing multitude of persons, acting as monarchs, presidents, heads and members of the government, members of parliament etc. In general not one of these persons has even the faintest idea that the law should consist of his commands. Everyone of them finds in existence the rules which are called the law and are on the whole enforced. He can only bring about a change in some part of the law. The bulk of it existed before him and will continue to govern the life of the country when he is gone.

Further, it is to be noted that the law-givers in general attain their positions and exercise their power by means of the rules of law. The monarch e. g. owes his place to the rules of the con-

stitution concerning the succession to the throne, the head of the government has been appointed by the monarch, the members of parliament have been legally elected etc. It makes no sense to pretend that the rules which carry these people to their positions are their own commands.

If the rules of law were the commands of any single individual or group of individuals, this would be apparent in the act of legislating. Perhaps nothing is more illustrative of the falseness of the imperative theory than the part played by the individual law-givers in laying down new laws.

In e. g. a constitutional state the usual course of legislation is, in broad outline, the following. A commission is instructed to make a draft proposal. When the draft is ready it is scrutinised by the ministry in charge of the question before being submitted to parliament. After renewed scrutiny there, voting takes place. If the vote is favourable the final touch is given to the proposal by an act of promulgation through the government or the chief of the state. Then the law is deemed to be "in force".

Among the people thus active in the process of legislating there is nobody who commands. Only the members of parliament, or of the government, and the head of the state could be

considered in this connexion. Behind them there may be other persons who hold the real power and determine the content of the law without appearing in the act of law-giving. But nobody will pretend that the law consists of the commands of those unknown persons. Only the formal law-givers could be meant in this context.

Now the members of parliament certainly do not command. The voting only implies a formal act, prescribed in the constitution. The members walk out of different doors, they put their hands up etc., which is something very different from issuing commands. An additional reason why the individual members do not command is that only the result of the voting decides the fate of the proposal. How could a member believe himself to command when he knows that his contribution is only to add one vote to the sum of votes on the one side or other? Finally, he need not know the contents of the supposed "commands". In most cases his knowledge of them is very fragmentary.

The members of the government usually act as "advisers" to the head of the state. If this is the case they cannot be said to command, even it the real power should be theirs. They "submit" their proposals to the man at the top. If, on the other hand, they act as formal law-givers them-

selves, their position is similar to that of the members of parliament.

The head of the state does not command anything to anybody when issuing a new law. He only signs his name at the bottom of a paper, which is placed before him by a minister. Further, he need not have, and generally does not have, even the most superficial knowledge of the contents of the new laws. What he does do is obviously only to perform a certain act, prescribed in the constitution, which for certain reasons has important consequences in social life.

The impossibility to define law as the commands of any single human individual or groups of individuals, is therefore evident. Not even at the moment when the act of legislating is performed can we speak of any commands. Still less could it be said that the law-givers command permanently according to the contents of the laws — a monstrous idea, which must, nevertheless be accepted by the adherents of the imperative theory. It is not enough that there was once a command. The meaning must be that there is now, at every time, a vast bulk of commands regulating our lives — which is absurd.

These obvious facts are glossed over when law is defined as the commands of the state. In this connexion the "state" cannot be taken in a

realistic sense. The word does not signify an actual organisation only but at the same time a superhuman entity also. The commands are ascribed to this entity. Such an entity, however, exists only in imagination. The talk about it is pure mysticism, if not empty words. There should be no necessity here to refute the notion of a superhuman being, endowed with a will of its own and the capacity to command. It is, however, only by imagining such a being that the theory of the law as the commands of the state can be given any sense at all.

The arguments against the imperative theory could easily be multiplied. Whenever the theory is confronted with reality, its falseness stands out. Nobody can take the theory seriously if its implications are made perfectly clear. Only through confused thinking can its many deficiencies be glossed over.

The law is not a creation of the state.

Thus we have seen that the law does not consist of *commands* by the state. But we can go one step further. The whole tendency to base the law on the state, to define the law as a creation of the state, is founded on an illusion. The state is not an entity, a power, existing independent of the

law. Therefore the law cannot be said to emanate from the state.

If we take the term "state" in a realistic sense, it signifies an organisation. But every organisation rests on a set of rules which actually have practical effect among a group of men. That is, there must be certain patterns of behaviour more or less generally known among the group, which exercise a determining influence on the conduct of the members of the group. If this condition is not fulfilled, there can be no organisation, but only anarchy. Now the rules through which the state organisation is built up are precisely those which we call the rules of law. In other words, the state (in the realistic sense) presupposes the law. It cannot exist without the law. Therefore, it makes no sense to maintain that the law is a creation of the state.

The common misconception on this point is largely due to the fact that the state organisation provides a machinery for making rules psychologically effective (through legislation). The misconception is all the more natural since most new rules, under modern circumstances, are introduced in this way. We shall turn our attention presently to the real significance of legislation. First, however, the nature of the rules of law must be positively defined.

The rules of law as "independent imperatives".

Though not real commands, the rules of law, as has already been said, are given in the imperative form. The ideas about certain actions in certain situations, which form the contents of the rules, are not narratively described in the rules. The text of the law does not say that the law-givers or some other persons actually have conceived such and such imaginations in their minds. This would be absurd. The ideas are *imperatively* expressed. Whatever words are used, the meaning of a rule is always: this action *shall* be performed under such and such circumstances, this right *shall* arise from such and such facts, this official *shall* have this or that power etc.

Now, does not this mean that the rules are, after all, commands? No, it does not. The term "command" may, of course, be used by everybody according to his own pleasure, provided that the meaning is made clear. What is important is not the terminological question. But different *things* must be kept apart if the real nature of the law is to be made clear. Such imperative statements as are found e. g. in the law must be carefully distinguished from commands in the proper sense. They are something else. The imperative theory has neglected this distinction.

For this reason it has been driven to unrealistic constructions in order to make the realities of the law fit in with the assumption that the rules are commands in the proper sense of the word.

A command in the proper sense implies a personal relationship. The command is given by one person to another by words or gestures meant to influence the will. Now the same kind of words is also used in many connexions where no personal relations whatever exist between the person who commands and the receiver of the command. The words can nevertheless have a similar, if not identical, effect. They function independently of any person who commands. We may in this case speak of *"independent imperatives"*, in order to get a convenient term.

As an example of independent imperatives may be cited the Decalogue. It cannot be said that Moses is commanding us to do this or that. Nor is this supposed to be so. The words are said to be the commands of God. In reality the Decalogue is a bundle of imperative sentences, formulated several thousand years ago and carried through the centuries by oral tradition and in writing. They are nobody's commands, though they have the form of language that is characteristic of a command.

The rules of law are of a similar character. They are imperative statements about imaginary

actions, rights, duties etc. As we have seen, they cannot be defined as anybody's commands. Those who have drafted them or acted as formal law-givers have not at all acted in such a way as a person who commands. And to those who take cognizance of the rules, the law-givers are for the most part entirely unknown. They have only the imperative statements as such before them, isolated from the law-givers, who may have died a hundred years ago. Thus the statements function, independent of any person commanding, as guides for people's conduct. For different reasons the patterns of conduct contained in the rules are taken as models for action in real life. The imperatively expressed ideas function as a cause of people's acting in certain ways.

The independent imperatives differ from commands in other ways too. A command in the proper sense is addressed to a *person* and is calculated to produce an action by that person, e. g. "Forward march!" But an independent imperative may be so to say directed into the air. It does not say to an individual: *you* shall do this or that, but, abstractly: *this action* shall be performed, e. g. a murderer shall be condemned to death. A "shall" is here connected with an idea of an action, not directly addressed to a person. It is quite impossible for the law-givers directly to address themselves to the present and future

judges who may come into situations corresponding to that imagined in the law. Instead the action itself is put forward as an action that *shall* be performed. Or the meaning of a rule may be that a "legal relation" *shall* be established under such and such circumstances, e. g. the bond of marriage shall exist when the wedding has taken place. Here the imperative expression is connected with the idea of the entering into existence of a certain relation, qualified as marriage, not directed to a person. In a similar way the "shall" of a rule may be connected with the establishment of a right or a duty. The right of ownership, e. g., *shall* be acquired in such or such a way.

A further difference between real commands an some independent imperatives may also be briefly pointed out here. A real command cannot be transcribed into a sentence expressing a judgment. The command: "Blow your nose!", e. g., cannot be replaced by a sentence like this: "It is really so that you shall blow your nose". Such a sentence, if taken literally, appears as absurd.

But an independent imperative may sometimes be replaced by a sentence which expresses a judgment. In the Decalogue we have e. g. the imperative statement: "Thou shalt not steal!" It does not in the least appear to us as intellectually absurd to replace this expression by saying: "It is really so that you shall not steal", or: "It

is your duty not to steal". Formally, these sentences give expression to judgments. And we believe that real judgments lie behind them. Seemingly, therefore, we are able to instruct each other about what we shall do, i. e. about our duties. We believe that we have a knowledge of this and that we can impart this knowledge to others, just if it were a question of facts in the surrounding world.

Here a fateful illusion is concealed. We do not impart knowledge by such utterances, we create suggestion in order to influence the mentality and the actions of other people. There is no real judgment behind the sentences. The objective nature of an action is not determined by saying that it should, or should not, be undertaken. What lies behind the sentences is something other than a judgment. It is that, in our mind, an imperative expression is coupled to the idea of an action. This is a *psychological* connexion only, though of the utmost importance in social life. But for certain reasons the connexion appears to us as existing objectively. Thus we get an illusion of a reality outside the natural world, a reality expressed by this "shall". That is the basis of the idea of the binding force of the law.

Our moral rules as a whole are such independent imperatives, emanating from various

sources and not always very consistent. For certain psychological reasons which need not be discussed here, they have a powerful appeal to the mind, so that we feel bound by them. But for this very reason we are not content to look at them as mere strings of words, working on us by suggestion. We seek something solid behind them. Usually, therefore, they are more or less openly ascribed to God.

This mysticism has its counterpart in the legal field. In the same way as God is put behind the moral rules, so the state is put behind the rules of law. They are represented as expressions of the will of the state or as commands of the state and therefore really binding upon us. The real state, however, can give no commands, as has been shown. Only the state in a methaphysical sense, a true god on earth, can be thought of as commanding or expressing its will in the rules of law. But that is pure mysticism.

With the disappearance of the mystical background, our notion of the *existence* of the law must suffer a radical change. We are dimly conscious of a permanent existence of the rules of law. We talk of them as if they were always there as real entities. But this is not exact. It is impossible to ascribe a permanent existence to a rule of law or to any other rule. A rule exists only as the content of a notion

in a human being. No notion of this kind is permanently present in the mind of anyone. The imperative appears in the mind only intermittently. Of course the position is not changed by the fact that the imperative words are put down in writing. The written text — in itself only figures on paper — has the function of calling up certain notions in the mind of the reader. That is all.

In reality, the law of a country consists of an immense mass of ideas concerning human behaviour, accumulated during centuries through the contributions of innumerable collaborators. These ideas have been expressed in the imperative form by their originators, especially through formal legislation, and are being preserved in the same form in books of law. The ideas are again and again revived in human minds, accompanied by the imperative expression: "This line of conduct *shall* be taken" or something else to the same effect.

The difference between moral and legal rules will not be specifically discussed here. I am inclined to suggest that it is impossible to draw a sharp line between them, because there seems to be no fundamental difference. Many legal rules are at the same time regarded as moral rules. The reason why a rule is said to be a moral rule, imposing a moral obligation, is not to be

found in the nature of the rule itself but in the response it evokes in the mind. In other words, the moral rule cannot be distinguished from a legal rule by its objective character. The distinction is made on the basis of feelings, but is erroneously believed to rest on objective circumstances.

II

THE ESTABLISHING OF RULES OF LAW

Thus I have tried to explain what a rule of law is: what are its content and its form. We will now proceed to see how these "independent imperatives" acquire their social significance through being incorporated in the machinery of society. Under modern conditions the chief way of achieving this is legislation according to the rules of the constitution. We will therefore first examine the significance of such legislation.

Besides ordinary legislation there are other ways also of introducing new imperatives into the legal system. The most important of these is the setting of precedents by the courts. The influence of jurisprudence in some countries may also be mentioned. These questions will be briefly treated in the following. In addition we must try to explain the original laying down of a constitution. Otherwise the answer to the first question would seem to be hanging in the air.

Ordinary legislation.

From the traditional standpoint the act of legislating implies something inexplicable, though this is not always clearly realised. It is, however, inexplicable how the draft, or bill, can be lifted into another sphere of reality through being promulgated as a law. The draft is only a set of fictive articles, put before the legislative authorities for their consideration. The promulgated law, on the other hand, contains "binding" rules, i. e. it has a supernatural force. Thus the draft has undergone a profound change through the act of promulgation. The law is in essence something entirely different from the bill. And this change has been brought about by a vote in an assembly, or by the signing of a paper by a person in a prominent position.

This mysticism, and the scholasticism which follows in its wake, obviously has its origin in the idea of the binding force of the law. Once this idea is discarded as superstitious, there is nothing inexplicable about the act of legislating. It may be difficult to give a full explanation of its effect, since the matter is rather complicated, but the explanation will deal with facts only.

Legislating has an *actual* effect of supreme importance to the community. The draft had no significance for social life beyond that of being

an object of discussion and formal proceedings. It was not a wheel in the machinery of the state. But the law is. The officials take it as a model for their actions and are virtually compelled to do so. The general public must take it into consideration as a barrier against some activities and a furtherance of others. The actual pressure of the law is there as soon as the draft has been promulgated.

This effect of the act of law-giving is in no way of a mystical character. It is only a question here of cause and effect in the natural world, on the *psychological* level. The purpose of the law-givers is to influence the actions of men, but this can only be done through influencing their minds. How the influence works on the individual mind is a question for psychology. For the purpose of this treatise we need only point out the general conditions which make law-giving possible as an effective instrument of governing society, the basic elements in the structure of society which are a prerequisite to the functioning of the law-giving apparatus.

Under ordinary circumstances legislation takes place in accordance with the rules of the constitution. Its effect results in the first place from the general reverence in which the constitution is held and the habitual obedience to

its rules. We find an attitude of this kind at least in every civilised country of the Western type (and no others need be considered here, for the sake of brevity). Everywhere there exists a set of ideas concerning the government of the country, ideas which are conceived as "binding" and implicitly obeyed. According to them certain persons are appointed to wield supreme power as kings, ministers, or members of parliament etc. From this their actual power obtains. The general attitude towards the constitution places them in key-positions, enabling them to put pressure on their fellow-citizens and generally to direct their actions in some respects.

I do not want here to inquire into the causes which have led to this attitude, or the causes which have brought those particular persons into power. That is a question for history and social psychology to answer. Here it is enough to point to the actual situation as it undoubtedly exists in every country where it is not temporarily suspended during a revolution. The attitude is not, of course, endowed with any intrinsic, self-supporting stability. It must be sustained through an unremitting psychological pressure on the members of the community. For the holders of the key-positions to maintain themselves in their places it is above all necessary

that they actually use the power conferred on them through the psychological situation in the country, and use it with a certain determination.

The attitude towards the constitution has a double significance. First, it causes people positively to accept duly promulgated laws as "binding" upon everybody and take them without reflection or opposition as patterns for their conduct. Secondly, the power to legislate is monopolised by those who are designated as law-givers in the constitution. The minds of the people are so to speak shut off in every other direction. Nobody else can secure attention or obedience in the field reserved for the law-givers by the constitution. To put up a competition with them in this field is in most cases meaningless.

Thus the effect of the attitude towards the constitution is first that the constitutional law-givers gain access to a psychological mechanism, through which they can influence the life of the country; secondly that only they gain access to this mechanism and that everybody else is debarred from using it or building up another of the same kind. I use the term "mechanism" on purpose as being, in my opinion, the appropriate one, since the reactions of people in this respect generally follow very definite lines and may be foretold with great accuracy. The

attitude of the public is — under normal circumstances — so rigid and uniform that the psychological effect of the act of legislating takes place smoothly, without any special effort on the part of the law-givers. We are so familiar with this situation that it seems to be a part of the order of the universe like the rising and the setting of the sun. Therefore, we do not reflect on the simple fact that the effect of legislation is conditioned by the psychological attitude which we ourselves and the millions of other people maintain. Because of this attitude the law-givers can play on our minds as on a musical instrument.

Besides the attitude of mind among the general public, another basic condition is required for the process of legislating to be effective. This is organisation. There must be a body of persons, ready to apply the laws, if necessary with force, since it would be clearly impossible to govern a community only by directly influencing the minds of the great masses through law-giving. We shall have to return to this matter later on. The organisation that wields force, the state organisation, is largely composed of persons who are trained automatically to execute the laws which are promulgated in the constitutional form, irrespective of their own opinion of their advisability. The organisation is therefore like a vast

machinery, so regularly and certainly does it function. The law-givers sit in the centre of the machinery as before a switchboard, from where they direct the different wheels.

The real significance of the act of legislating is now apparent. The draft is not lifted into another sphere of reality but is simply made the object of certain formalities which have a peculiar effect of a psychological nature. The formalities are the essential thing. The legislative act consists in nothing but these. The same statements as those contained in a law, if made by the same persons without observing the constitutional form, are of no avail.

There is no "will of the state", nor any real commands by the individual law-givers. What takes place is that the formalities prescribed in the constitution when applied to the "independent imperatives" in the draft, give to these imperatives a special importance for social life by shrouding them in a nimbus or labelling them in a certain way, thereby making people take them as patterns of conduct. For this reason they gain a practical significance vastly different from that of any other imperatives.

A law is, of course, always the work of some individual, or individuals, not of the abstract "state". What is required in order to make a law is to have access to the mechanism. It is al-

ways ready for use for anyone who has been born into a key-position or has the courage and skill and tenacity required to make a way to one. The ways are different in a monarchy and in a republic, in a democracy and a dictatorship. But the significance of the key-positions is on principle the same everywhere. The important thing is to be able to use those formalities, which, considering the psychological situation in the country, are required in order to give practical effect to independent imperatives.

The legislative machinery may be compared with a power-plant in a river. The common attitude towards the constitution corresponds to the water in the river. In the power-plant the energy of the current of water is transformed into electricity, which is distributed round the countryside to give light and heat and to set hammers and looms in motion. The power-lines are the particular laws, promulgated according to the constitution. The significance of the act of legislating is that a new power-line is attached to the power-plant.

Through the different laws, people are directed to keep dangerous elements at bay, to maintain a certain division of property, to take care of the old and the sick, to educate the youth etc. All this work, which is indispensable to civilised life, is made possible through the common attitude

towards the constitution. This attitude, in fact, functions as an immense source of power to the legislative machinery, enabling those who are in the key-positions to govern the country.

In order to avoid misunderstanding it should be pointed out, however, that the comparison covers only one aspect of the question. There is a difference in that the current of the river possesses a force which for its existence is independent of the power-plant. The river runs its course whether there is a power-plant or not. The attitude towards the constitution, on the other hand, cannot be maintained unless the constitution is actually applied and power exercised according to its rules. There is for this reason a double relationship between the legislative machinery and the attitude towards the constitution, which makes the machinery effective. They condition each other reciprocally. Therefore the chain of cause and effect is infinitely more complicated than in the case of the river and the power-plant. The comparison is, however, appropriate to illustrate one side of the relationship, that side which is under consideration here.

That the constitution is a source of power for the act of legislating does not imply that the actual force of the law, its continued effectivity, is dependent on the same constitution's being in

force. It is well known that this is not the case. Very often a system of law remains virtually unaffected though the constitution is set at nought by a revolution, as e. g. the codes of Napoleon have survived all the revolutions and turmoils in France which have taken place since his time. Such facts do not in the least contradict what has been said about the constitution as a source of power for legislation. The point is that the observance of the constitutional forms is the means to fit the draft into the machinery of society and create respect and obedience for its contents. Once this is done, the constitution may be thrown over without necessarily endangering the laws which have been promulgated according to its provisions. The respect for the law may survive the causes that have, originally, brought it into being. Other causes come into play and maintain the respect. When a law has become a part of the structure of the community, many interests grow up around it. It cannot, therefore, be put aside without causing disturbance. In a revolution the new rulers are therefore almost always interested in taking over, at least provisionally, the bulk of the old law.

In order to maintain a law, however, there must always be a constitution in practical force, though it may be another constitution than that which was in force at the time of promulgation.

A constitution there must always be, because there must always be an organisation capable of carrying out the provisions of the law. Otherwise the law would obviously be reduced to empty words. But the organisation presupposes a constitution. It cannot exist without rules, and the constitution contains the fundamental rules for the organisation of the community. In this sense the constitution is a source of strength not only for the law at its promulgation but also for its maintenance.

To sum up, the significance of legislating is not that the draft acquires a "binding force" by being promulgated as a law. The relevant point is that the provisions of the draft are made psychologically effective. And this result is attained through the use of a certain form, which has a grip over the mind of people. The form, therefore, is the essential thing in legislation.

This contention must not, however, be too narrowly interpreted. In actual life it is certainly not an absolute condition for the effectivity of legislation that the form prescribed by the constitution is rigidly observed. In most cases there is a certain latitude for the law-givers. They may be able to depart in some respect or other from the formal requirements of the constitution without impeding the effectivity of their laws. This depends in the first place on the spirit and

habits and doctrines of the officials, especially the judges. Sometimes they keep a very sharp-eyed control on the observance of the constitutional forms. They may even—as in the United States—see to it that the contents of the laws fit in with the supposed contents of the constitution. In other cases the officials blindly accept everything that is promulgated as a law by the government of the state, without inquiring into its genesis. This only means that in practice the formal requirements are virtually reduced to a single one, viz. that the law must be promulgated by the proper persons. The main point is that the act of legislating is always a pure formality, giving the draft a certain stamp in the eyes of those concerned and thereby fitting it into the machinery of society.

Informal methods of establishing rules of law.

Formal law-giving is not the only method of establishing rules of law. Some law-givers, it is true, such as Justinian and Napoleon, have endeavoured to exclude all other methods and make the formally constituted law the one and only law. But they have not succeeded. Other rules, which may be summarised as traditional law *(Gewohnheitsrecht)*, are perforce formed outside the sphere of legislation.

To those philosophers who have tried to represent law as the will of the state, traditional law has been a thorny problem. Here the theory of the will is even more remote from the facts than in respect of formal legislation. Traditional law is to a large extent developed more or less unconsciously, new rules being formed without deliberate intention on the part of anybody. It is therefore impossible to say with the slightest semblance of truth that those rules are commands or expressions of a will.

With a realistic conception of the law the problem of the forming of traditional law is no more insoluble than that of ordinary legislation. In both cases what takes place is the introduction of new imperatives into a system of imperatives that is regarded as binding and has practical effect. In both cases there is nothing but a chain of cause and effect on the psychological level.

As an example of traditional law, the Common Law, which is mostly case law, may be mentioned. It is well known how this body of rules has developed. The judges are supposed to apply "existing" rules only. Actually, it would be impossible for them to fulfil their task if they kept strictly to this demand, as they frequently encounter cases which are not covered by the old rules. Often, too, they modify these rules in order to meet the requirements of a new time, or

even pronounce judgments in open contradiction to them. It is therefore obvious that many judgments are not based on any previous rules. Through the prevailing doctrine of the binding force of precedents, such a judgment obtains almost the same significance as if it were the outcome of a legislative act, since judges are considered to be bound in the future by the principle expressed in it.

Thus Common Law is undergoing a constant change and a constant development, though this fact is veiled by the official theory that every judgment is nothing but an authoritative statement of an existing rule only. If the judges believe in this theory, they can have no intention of making new rules. And the imperatives are not regarded as being their own inventions but as existing beforehand.

The forces which give practical effect to the judge-made rules are similar to those which support the law-giving machinery. The reverence in which the constitution is held is the dominating factor. The position of the judges is determined by the constitution, and the doctrine of the binding force of precedents can also be reckoned as an ingredient part of the constitution.

But independent imperatives may also become effective as law without direct reference to the constitution. Sometimes new rules are

introduced through the works of jurisprudence. I am not referring to English conditions in this connexion. In England jurisprudence, or legal science, seems to be, on the whole, a science *about* law. Its aim is to investigate the legal system from a historical, social or philosophical point of view. The text-books, on the other hand, are not scientific works but merely compilations of precedents and statutes. In some other countries, as for instance in Germany or in Scandinavia, legal science is primarily regarded as a science *of* law. Its chief purpose is to propound the true meaning or contents of the rules. The legal writers do not, of course, assume the rôle of law-givers. Nevertheless, the effect of their writings is often to establish new rules. They are supposed to describe only what is already present in the law, but they give a great deal more, because they are trying to fill up the gaps in the law. If they succeed in convincing the judges of their theories, new rules put forward by them as the result of scientific research make their way into the practice of the courts and may at times be as firmly established as are the rules of the Statute Law. No wonder that some philosophical writers put legal science among the sources of the law, though this obviously does not fit in with the supposition that law is the commands of the state.

In the development of traditional law a supposed knowledge of an already existing law has been, and to some extent still is, a means of introducing new rules. But this supposed knowledge is not necessary for the purpose. Even if we clearly realise that the judges are not confined to merely applying an already existing and complete law, precedents are bound to be important for the future adjudication of similar cases. The need for continuity in the administration of justice is so great that the courts simply cannot in actual fact refrain from taking precedents into account. In our days the real situation is more and more generally realised, though the older point of view is not altogether discarded.

It is not necessary for the purpose of the present treatise to investigate more thoroughly the interesting problems of the growth of traditional law. The important thing from our point of view is to stress that here as well as in the case of formal legislation it is a question of certain ways of making independent imperatives effective in a community. It is quite natural that different ways may be used to this end, though formal legislation is by far the most important nowadays.

The original laying down of a constitution.

A constitution may, of course, be altered according to its own rules. Sometimes even a completely new constitution may be created in a legal way. It can also happen that a constitution has been slowly evolved from a primitive stage as traditional law. In most cases, however, if not in all, the constitutions of civilised countries have originally been laid down by means of a revolution or a war, i. e. by force. At least the present holders of power or their antecessors have instituted themselves by such means, even if this did not imply a major alteration of the constitution. At some point, therefore, the chain of legal development is broken by acts of violence or generally unlawful acts, which consequently seem to be the ultimate source of the existing order.

These facts are often regarded as peculiarly puzzling. "The problem of the revolution" has been thoroughly discussed in legal philosophy. It seems hard to understand how acts of violence can give rise to "binding" rules. Legislation of this kind appears to be a still more mysterious process than ordinary legislation. The constitutional law-givers are supposed to have a right to give binding rules. But the revolutionaries are not only devoid of any right in this connexion.

They are acting in defiance of existing law. Yet the new constitution is the basis for new laws, whose binding force is not questioned.

When the superstitious notion of a "binding force" in the law is discarded, the dilemma is resolved, but only then. From the traditional standpoint, the birth of Law from Force must remain a mystery, puzzling for ever the brains of unfortunate philosophers. Actually, the laying-down of the constitution through revolutionary acts is no more mysterious than ordinary law-giving. In both cases what really happens is that a set of independent imperatives is laid down by some individuals with a claim to obedience in a whole country. The difference is in the causes which make the imperatives effective.

While ordinary legislation is made effective through the general reverence for the constitution, working as a *permanent* source of power, a revolutionary constitution is pressed on the people by other means. There must be a *temporary* assemblance of forces strong enough to effect that change in the attitude of the citizens which is implied in the acceptance of a new constitution as binding. For the ordinary law-givers no special effort is required to make their laws effective, because they have at their disposal a ready-made machinery. The revolutionaries have got to create the machinery them-

selves, i. e. to turn the minds of the people into new channels through which psychological pressure can be brought to bear on them.

To break the attitude of obedience to an established constitution, exceptional circumstances are required, a so-called "revolutionary situation". The old imperatives concerning the government of the country are usually put aside only under the stress of desperate economic conditions, of ravages of war, of oppression by a victorious foe etc., in conjunction with new ideals and slogans, inflaming the mind of the people with hate and hope. The holders of power lose their grip on the population. One day, they are dethroned by force or ignominiously slip out by a backdoor. New men step into their positions and boldly declare: This is to be our constitution, thus shall the country be governed. Perhaps the attempt fails. Then the planned constitution remains a scrap of paper, a mass of empty words. But if the revolution succeeds, if a government is set working according to the principles of the new imperatives, these are henceforth the constitution. To put it briefly: *victory* of the revolution corresponds to the *constitutional form* in ordinary law-giving. New rules are then given in accordance with the new constitution and are soon being automatically accepted as binding. The whole machinery is

functioning again, with more or less difference in regard to the aims and the means of those in power.

Beyond the "revolutionary situation" two things are above all necessary to complete the change: *force* and *propaganda.* Force, to oust those who hold the key-positions, to frighten their supporters, to combat resistance. Propaganda, to prepare the minds for the new imperatives. The suggestive force of these imperatives is not sufficient in itself. They would fall to the ground if the minds of the people were not being specially prepared to receive them. The object of the propaganda is to mould the psychological situation in the country in such a way that an adequate response is assured.

The wheel of time, however, rolls on. Just as the ordinary laws remain effective even if the constitution by which they have been made is abolished, so the constitution itself may survive the causes which originally lent it force. The revolutionary ardour may vanish. Poverty and distress may lessen. Defeat may be turned into victory. Yet the constitution built upon those conditions retains its practical effect. Round about it innumerable interests have clustered. Its provisions have sunk into the hearts of the people. And the new building stands firm when the scaffolding is removed.

Further, the revolutionaries are sooner or later caught in the toils of their own system. The psychological effectiveness of the constitution implies a certain attitude on the part of the people and this attitude cannot be changed from day to day. A considerable effort is needed to bring about any fundamental alteration, if it can be done at all. The power of the rulers is therefore always more or less narrowly limited, regardless of the way in which they have attained their positions, whether by legal or revolutionary means.

The immediate obstacle to any revolutionary attempt is always the general loyalty to the existing constitution. When the constitution has once broken down, however, the inveterate habit of obedience to a set of rules of government is a source of strength to the new constitution. The attitude is simply transferred from one set of rules to another. This change-over is sometimes accomplished with astonishing ease, especially when the new rules are better adapted to the economic conditions and to prevalent ideas of justice.

More generally speaking, the principal source of strength to the constitution is in the social habits and instincts of the people. This is so *during* the reign of a constitution as well as when a new constitution is established. The revolu-

tionaries can gain power only by utilising this force in the proper way. Paradoxical as it may seem, success in the revolution depends upon the working of those human characteristics which make for law-abiding.

To resume the comparison with a river, the various constitutions may be said to correspond to different channels, into which the water of the river is led at different times. The river represents the force implied in the social habits and instincts. The flow will provide energy that can be utilised only if it is led through a common channel. Otherwise the water will divide in useless rivulets and the ground will be a marsh. In the same way, the social forces of a community must be unified through a constitution which is generally respected and therefore results in a common attitude to a legislative authority. Without that, chaos and destruction is unavoidable.

A revolution may be defined as a process by which a new channel is given to the river. Sometimes this implies a major catastrophe. The river breaks through its banks, flooding fertile fields, destroying woods and towns, drowning those unfortunates who stand in its way. By and by, however, the river settles down to its new course. The current calms down again and new life springs up on its banks. In other cases the

question is only one of removing an obsolete lock or of straightening the course at some point or other.

No absolutely sharp line can be drawn between revolutionary and ordinary legislation. As was pointed out, the constitutional law-givers often have actual power to depart more or less from the formal requirements of the constitution. Further it is a well-known fact that a constitution may be "interpreted" in a sense which is wholly different from the original one. Constitutions are far more exposed to varying and arbitrary interpretations than ordinary laws, because their application is not in general done by impartial judges but by politicians. The only control on these people is often public opinion, which may be manipulated by them to a considerable extent.

The search for a "final" explanation of the law.

At this point a very natural objection might be made. The exposition has aimed at showing, in broad outline, how *new* imperatives are introduced into the legal system. It has, then, been presupposed that such a system is already in existence. Therefore no *final* explanation of the law is given, nor can such an explanation be reached on the lines followed here. The explana-

tion given refers exclusively to changes in the law and to additions to the law, not to the origin of the system as a whole.

This is perfectly true. It was pointed out e. g. that it is the general respect for the constitution that makes new rules effective when introduced through legislation. The constitution itself was traced back to a revolution or war. But this does not mean that a revolution or war is to be regarded as the *ultimate* source of the law as a whole. Such a supposition would be entirely wrong. A revolution takes place in a society where a law is already in force. It is a way of changing the law. It affects immediately only certain parts of the legal system, in the first place the constitution, while many other parts of the law, especially the fundamental rules of criminal law, may remain unchanged for the time being.

Thus a revolution is only one step in the long development of the law. The change refers to an already existing system of law and is limited in scope. The same observation applies to every other way of laying down new rules.

But the historical explanation *can* only be concerned with changes in the law. We can never trace law back to its "ultimate origin". No original foundation of a society has been revealed to us. What we know of Man refers to stages in which an organisation, and conse-

quently a system of law, has existed for a very long time. Even so-called primitive communities have, of course, their law, which is often highly complicated.

The colonisation of Iceland or America must not be cited as examples of an "original" foundation of society. The settlers in these cases belonged to existing societies and brought along with them their heritage of beliefs and usages and of knowledge. In short, their whole mental equipment presupposed a communal life. They organised their new societies with materials taken from the old ones.

The historical explanation always refers to a stage in the evolution of the law starting at a point where a system of law has been practised for a long time. At most some conclusions concerning an earlier stage may be drawn from known facts. But this does not lead to a "final" explanation. It is futile to ask how the system as a whole has been established from the beginning. The objection that our exposition has not furnished an answer to that question is therefore of no weight.

III

THE IDEA OF RIGHTS

In the preceding the idea of a right has been left out of consideration in order to simplify the exposition. It is now necessary to take up this question, to explain the meaning of the idea, examine its relations to social facts and show what is its actual rôle in legislation and the administration of justice. First, however, a few remarks should be made concerning the idea of legal duties.

From what has already been said about the "binding force" of the law it is clear that the idea of duties is entirely subjective. When the binding force of the law is an illusion there can be no legal duty in an objective sense. Duty has no place in the actual world, but only in the imagination of men. What really exists is certain feelings of duty with which the idea of an imaginary bond is connected. Attempts have often been made to vindicate the reality of legal duty by pointing to the existence of legal sanctions. These attempts are, however, doomed

to failure. The threat of sanctions is different from duty. The duty to respect other people's lives is obviously not identical with the fact that murderers are hanged if caught and found guilty. The sanctions are imposed according to the current ideology because a duty is violated.

The idea of duty and the feelings of duty are certainly of the utmost importance in social life. But science has to do only with this idea and with these feelings, not with the imaginary bond itself as something objectively existing.

The law-givers quite naturally make use of the idea of duty. Since they share the common ideology, to them their obvious task is to impose upon the citizens those duties which are required in the general interest. That the duties are imaginary bonds only does not impair this technique of legislation. The proclamation of duties in the form of law is an excellent means of influencing people's actions.

With regard to the conception of rights the situation is analogous. It is generally supposed that the so-called rights are objective entities. We talk about them almost as if they were objects in the outer world. On reflection we do not, of course, maintain that this is the case. But we firmly believe that the rights exist outside our imagination as objective realities, though they are necessarily something intangible. We cer-

tainly do not confine their existence to the world of imagination. Suggestions to that effect are commonly rejected with scorn and indignation. Yet on close examination it is revealed that the rights just as well as their counterpart the duties exist only as conceptions in human minds.

On this point no doubt can really exist once the notion of the binding force of the law is rejected as absurd. The dissolution of this basic conception must entail the demolishing of all the metaphysical conceptions in the law, or, better, the consequence must be that these conceptions appear in their true light. They emerge as pure imagination without correspondence in objective reality.

I do not refer to the so-called natural rights only. Even the positive or legal rights are unreal. There are certain social facts, it is true, with which the idea of a right is closely connected. These facts are easily confused with the imagined right, such as it exists according to current notions. No mistake should be possible, however, if the facts are stated and confronted with the notion. It will then be evident that the notion does not correspond to the facts.

In order to demonstrate this we may adopt the simple method of enumerating the facts which are connected with the idea of a right and

ask if perhaps one or other of these facts might be identified with the right. In this manner we avoid the difficult task of fixing from the beginning the actual contents of our notion of a right. We will return, however, to this question later on. When a survey of the social facts has been made we shall be somewhat immune to the danger of hastily identifying the right with some such facts as are only dimly conceived and not carefully stated.

The idea of a right confronted with the facts.

To many scholars the confrontation of the right with the facts may seem to be entirely superfluous since the right, quite obviously, is something different from the facts, something above them. It might be said that no special investigation would be required to demonstrate this well-known truth, since legal philosophers as well as jurists have always treated the right in that way.

Such a statement would no doubt be true. Nevertheless constant efforts are made to vindicate for the rights a place in the real world. The reason is not difficult to discover. Nobody who pretends to consistency in his outlook can be satisfied with the blunt assertion that the rights are something above the facts, something

belonging to another world. If it is maintained that they are objective realities, their relation to phenomena in the world of time and space must be defined, e. g. their rise and their extinction through happenings in that world. But once the question is so formulated, it can only be answered by identifying the rights with some facts, since nothing can be put in relation to phenomena in time and space without belonging to time and space itself.

It is impossible, therefore, seriously to maintain the contention that the rights actually stand above the facts. Only two courses are open when a scientific explanation of the matter is sought for. The one is to show that the rights exist only in the imagination of men, i. e. that they belong to time and space only as the contents of notions in human minds. The other course is to prove that the imagined rights correspond to facts in the outer world. Now I want to show that this latter course is unpracticable.

As an example we may take the right of ownership under present conditions. The facts that are connected with the idea of this right are briefly the following. (I refer to the most simple case only: full ownership by an individual who is in no way incapacitated.)

1) The thing itself, the object of the right.
2) The law, the "independent imperatives".

3) The legal machinery existing in the country, working according to the rules of law.

4) The favourable position of the so-called owner in regard to this machinery. The owner enjoys some definite advantages if the machinery actually functions as prescribed in the law. He may e. g. recover damages if the thing is injured by an act of negligence on the part of another person. That is to say, if he has the money to bring an action against the person responsible for the damage, if he can prove the negligence to the satisfaction of the court, and if the court acts according to the pattern in the law, he will get a judgment for the damages. An altogether different question is whether this judgment will be of any material advantage to him. This depends on the economic position of the defendant. In many cases the plaintiff will not even recover the costs of the action. Thus the advantages to the owner resulting from the regular functioning of the legal machinery are always more or less uncertain. Briefly, his position is that he is able to set the machinery in motion under circumstances defined in the law. To this end, however, some strength on his own part is always required, and there are many obstacles to be surmounted before he has the money in his pocket. It should be added, however, that even if the owner does not bring an

action himself, the legal machinery is often set in motion when his possession of the thing is interfered with. In our time theft e. g. is punished by the authorities acting on behalf of the community. In many countries the owner is actually debarred from bringing a criminal charge of a serious nature. Thus, the function of the legal machinery in regard to the owner is twofold: in some respects it is set in motion only by the owner himself, in other cases it functions independently.

5) As a fifth fact the actual sanctions themselves may be mentioned. But it should be kept in mind that the infliction of a sanction is a very rare occurrence in relation to the cases of ownership and their duration.

6) The sixth fact to be mentioned is the security of the owner in enjoying actual control over the thing. When you have bought a car and paid for it, you can usually do with it what you like, provided you do not exceed the speed limits etc. If you own a house, you can live there without being disturbed. You never dream of having your overcoat torn off your back by somebody in the street etc.

This fortunate situation on the part of the owner is, of course, conditioned by the behaviour of his fellow-citizens. His exclusive possession of the object, his actual immunity in enjoying it,

results from the fact that others habitually refrain from interfering.

Under all circumstances the security is a relative one. The car may be stolen, the house set on fire, the coat torn off. It is always a question of more or less security, not of an absolute immunity from attack. The very high level of security attained in the Western communities presupposes that the attitude of abstention is very strong and very general. On the whole, it never enters the head af the average man to lay hold of other people's property and if this idea should present itself occasionally, it is immediately rejected. It needs only a slight slackening of this frame of mind for the security to be destroyed. Suppose people to refrain from taking what they like only in 90 % of the cases when an occasion presents itself; or imagine 10 % of the population to be devoid of any psychological inhibitions with regard to the property of others — under such conditions the security would be very small indeed.

7) The causes which determine the general attitude are of necessity very complicated. One fact, however, stands out clearly. This is the paramount importance of the law, including the legal machinery. The enormous pressure exerted by the law is hard to estimate, not least because we are, generally, no more conscious

of it than of the air we are breathing. We need not enquire here into the ways in which the pressure works. It is enough to recall its existence. This is the last of the facts that must be mentioned in connexion with the idea of a right.

Now, where does the right come in? Obviously the right of property is not identical with the thing owned. Nor is it identical with the law, or with the legal machinery, or with its psychological pressure on the population, or with the actual sanctions which are, from time to time, applied in individual cases. There remain to be considered only the favourable position of the owner in regard to the legal machinery and his relative security in enjoying control over the thing. These are the only facts which could, with any semblance of truth, be said to correspond to the notion of the right of property as we conceive it. On this point, therefore, a more careful scrutiny is required.

Is the right of property, such as we have it before us in our minds, identical with the relative security of the so-called owner? Certainly not. Ownership is not ascribed to everyone who is in a position to do what he likes with a thing. In that case the successful thief, e. g., would be classified as legal owner! Further, the owner, i. e. the person who has a legal title to the ob-

ject, need not have any real control over it in order to be owner. Even if the object has gone out of his possession in some way or other, his right to it remains so long as nobody else has acquired the ownership according to the law.

It is obvious therefore that, according to current opinion, the right of ownership and the actual enjoyment of the possession are different things, though they are often both present at one time. By many jurists the actual possession has been defined as the counterpart in the real world of the right of property, which is represented as belonging to another context. They cannot always coincide, because the presence of the right is determined by the law. The right is acquired when such and such facts have taken place, e. g. a sale, the death of a relative etc. It is lost on account of corresponding facts, such as a new sale, a donation etc. The existence of a right is absolutely dependent on these facts, whose legal effects are determined by the law. The actual possession, the ability to use the thing, on the contrary, depends on a multitude of conditions which cannot be ascertained by reference to the law alone. The legal title is certainly of great importance in this respect too, since people habitually take care to abstain from interfering with the possession of the holder of a title. But the actual ability to use the object in question is

not absolutely determined by the law. The legal title is only one factor among many determining the actual position of the owner, and its effects are always of a relative character.

It remains to be seen if the right of property is equivalent to the favourable position of the owner in relation to the legal machinery, i. e. if the right is identical with his actual ability to set the legal machinery in motion to further his own interests. Without doubt this ability is closely connected with the idea of a right. But it would be a great mistake to confound the right, as conceived in our minds, with the actual ability.

First, the right is regarded as something antecedent to the ability to set the legal machinery in motion. The claim of the plaintiff is based on a right, and when judgment is given for him it is said to be because he has shown the right to be his. The plaintiff e. g. claims to be owner of a thing which is in the possession of the defendant. According to current opinion he must then establish his ownership in order to win his case. His right, therefore, is not identical with the fact that he is in a position to procure a favourable judgment. Instead, the right is regarded as a condition for such a judgment, as something that must be ascertained by the court.

Secondly, the favourable judgment is not al-

ways obtained even if the plaintiff, according to legal theory, has got the right in question. The burden of proof placed on him may debar him from success, the court may form a wrong view of the facts etc. On the other hand a plaintiff who really has no right at all may win his case. Success in litigation obviously depends on many other facts beside those which according to the law determine the existence of a right. Therefore success in litigation may or may not coincide with the right.

Thirdly, the right is thought to exist even if no action ever arises. Special circumstances are required in order to give rise to an action for the owner. The object must e. g. get into another person's possession, it must be damaged etc. In the meantime the right of property is there. No lawyer has any doubt on this point. The action is said to arise because the right has been violated. The right, therefore, exists indepedent of any actual ability to bring a successfull action. In addition, the "action" to which the right of property gives rise when it is violated, is in itself a kind of right and not an actual ability.

It might be suggested that the right of property is identical with the vague possibility of bringing successful actions in various directions in case of negligence, theft etc. But this solution

would be erroneous. If that were what is in our minds when we speak of the right of property, then our notion of such a right would be highly complicated. It would, in fact, embrace a large part of the legal system and, in addition, a great many other facts, such as the economic position of the owner etc. It is, however, unquestionable that we have something fairly simple before us when we speak of a right. The right implies, it is true, very complicated legal consequences, with which only trained lawyers are thoroughly acquainted. But that is a secondary consideration. The right itself is one thing, the legal consequences something else.

It is not very difficult to explain the confusion sometimes made between the right and the ability to bring a successful action. Everybody can bring an action, even if he has no legal foundation for it at all. He may even meet with success without any such foundation. The chances of success, however, are immeasurably greater for the claimant who has a legal title than for one who has none. If the administration of justice in the country is maintained on a satisfactory level, it is very hard to gain anything by litigation without a true basis in law. As a matter of fact, when no such basis is really present, success is, on the whole, possible only when the claimant can put forward some facts

that have so close a resemblance to those required by the law that a confusion can be made by the judges. In other words the facts must lie on the borderline of the law. Otherwise it is foolish to bring an action, since the result will only be a judgment for the defendant, with costs.

On the other hand a person who has really got a legal title or whatever else is required by the law has a good chance of getting a favourable judgment if the necessary evidence is at hand. Thus the so-called right and the favourable position are usually present in the same person. A confusion between them is easily made because we have no clear picture in our minds of what a right is. There is nothing substantial before us. We are therefore prone to fall back on something of a tangible nature, and then the favourable position in regard to the legal machinery lies near at hand.

What is the meaning of the idea of a right?

The discussion has shown that it is impossible to find any facts that correspond to the idea of a right. The right eludes every attempt to pin it down and place it among the facts of social life. Though connected with the facts — e. g. at the moment when it arises and is extinguished

— the right is in essence something different from all facts.

What really matters in litigation is the legal title, not the right. In our notion, the right is conceived as something created by the title. It stands between the title and the judgment and forms the immediate basis of the latter. It is very difficult to describe what this intermediate thing is really thought to be. But it certainly exists in imagination only. In the actual world the legal title does not create anything. It is a fact which, if proved in litigation, will be of decisive influence with the judge, if he acts according to the law. That is all.

The essence of the notion of a right is that of *power*. The owner "can" do what he likes with the object; the creditor "can" claim a sum from the debtor — that is the way we paraphrase the notion of a right when we are trying to explain what we are thinking of. Very often, it is true, we are inclined to say, instead, that the essence of ownership is that the owner is "protected" by the law. But this explanation is erroneous. It does not really give expression to our thought since, according to the current view, the protection is given to the right. The owner is thought to be protected because he has the right of property. Therefore, the so-called protection must not be identified with the right. The right

is represented as something antecedent. We hit the mark only when we define the right as power of some kind.

This power, however, does not exist in the real world. We have seen that it is not identical with the actual control over the object generally exercised by the owner, nor with his actual ability to set the legal machinery in motion. It is a *fictitious* power, an ideal, or imaginary power. This "power" is actually an empty word only. There is nothing behind the word. But the idea of possessing the imaginary power is apt to engender a *feeling* of power, i. e. a feeling of activity and strength. This feeling gives a semblance of substance to the idea and therefore helps to maintain the illusion that there is a real power present.

Most jurists of our time are, however, reluctant to admit that the right is an imaginary power only, and they seek by every means to escape from this conclusion. On the one hand they are dimly aware of the impossibility to identify the right with any set of social facts. On the other hand they refuse nevertheless to consider the rights as constructions of imagination only. That contention seems to them absurd. Are not the judges daily trying the rights of litigants? Are not the law-givers busy laying down laws, determining our rights? Are not,

therefore, the rights realities? Would not the social order be dissolved and chaos inaugurated if no rights were recognised as really existing? For these reasons and similar ones it is considered impossible to maintain that the rights are pure phantasies. The reality of the rights must therefore be vindicated. But how? The riddle is not an easy one.

Sometimes jurists who are endeavouring to approach the matter in a scientific way are heard to proclaim that a "right" is only "a metaphorical expression for a legal situation" or something like that. In this theory it is admitted that the so-called rights are not realities. On the other hand it is expressely denied that the idea of a right contains an element of superstition. The rationality of jurisprudence is apparently saved. The underlying meaning is that no conceptions of an unrealistic nature are actually entertained. It is only a question of expediency to use the metaphor instead of directly speaking of the complicated realities.

But is it true that the expression "right" is used metaphorically either in daily life or in legal language? A metaphor is a figure of language by means of which one thing is put in the place of another to which it has some resemblance. It is pertinent to ask here: what is put in place of what?

It is never explained in this theory what the metaphor consists of. Such an explanation would involve a thorough analysis of our conception of a right, a careful statement of what is actually in our minds when we speak about a right. Without that the theory is empty. And it is really empty, since no such explanation is proffered. The theory may in fact be qualified as an attempt to evade the difficult analysis of our thoughts and to cover up the matter with loose words.

Further, the facts replaced by the alleged metaphor could only be some of those facts which were enumerated above. The general line taken by the jurists representing this school of thought is that the facts indicated are the law. The metaphor, it is said, is "a short expression for a complicated set of rules". What we have in mind when speaking of the right of ownership would be a vast complex of rules about sale, inheritance, theft etc., but for the sake of convenience the expression "right" would be put instead of this complex of rules. The curious thing is, however, that the law itself speaks about rights. It determines e. g. how the right of property is acquired, how it is transferred, what are the consequences when it is violated etc. It makes no sense to say that, here, the expression

"right" is an abbreviated expression for the contents of the law itself. The word must have an independent meaning, or else it could not be used to express the rule. In actual fact the lawgivers make use of the notion of a right as well as of other notions that are current in the community and have an accepted sense.

It must be admitted, as has been stressed here, that the right as conceived in our minds is an imaginary power. But this notion is not really used as a metaphor. We use it as if the right were an objective reality, saying that rights are acquired, lost, defended etc. In fact the greatest indignation is often aroused if it is pointed out that the rights exist in imagination only. It is therefore impossible to maintain that the notion is actually used only to replace some facts. If I assert against another person that this is my property, I do not mean only that I enjoy an actual security in regard to the possession of the object in question. Then I should admit that my right would be lost if the adversary were strong enough to take it away. I may have in mind that I can go to the court and obtain a favourable judgment. But if so, I mean that this is a consequence of my right and that the right exists even if the consequence is most unlikely to follow for lack of evidence or some other reason. I may also

bear in mind that I have a legal title to the object. But the legal title is regarded as the foundation of the right, not as identical with the right.

If we frankly accept the fact that what is conceived in our minds is an ideal or fictitious power to control an object or to claim an action by another person, everything is easily explained. There is no need to shrink from this solution. The road back leads to the metaphysical jungle only. If, on the contrary, we accept the fact as it emerges from our critical analysis, a fertile field for investigation lies in front of us. The task will only be to place the *idea* of a right or a duty among other facts of social life; to study its origin and its functions in actual society, its psychological background, its technical use in legislation, its significance in the relations between individuals and between states, and so on. The search for truth need not be interrupted by constant excursions to the imaginary world of metaphysics, the results need not be obscured by an underlying assumption that the rights are, somehow, objective realities.

For what purposes is the notion of a right used?

In order to understand how the notion of a fictitious power can be current at the present time in legislation, in jurisprudence and in the

mind of the general public, we need only make clear for what purposes and in what connexions this notion is entertained. The chief question is, of course, how it figures in the law.

In the law the notion of a right is used as a means of directing people's actions and behaviour in general. I have stressed before the simple fact that the law is not intended to describe the world as it is but to determine the course of events. To this end it is not necessary that the notions used should always correspond to objective realities. But it is essential that the idea of a pattern of conduct should be awakened in the minds of those concerned and that they should be incited to follow it. This may easily be done by means of such notions as that of a right. Patterns of conduct can actually be set up through statements that a person has a certain right under such and such conditions.

But how is this possible if it is true that the conception of a right has the meaning indicated above? It was said that the alleged power is non-existent — that we are unable to seize the power which the word is believed to signify. The alleged power is therefore an empty word, as was pointed out above. Now it might be argued that patterns of conduct cannot be laid down by means of empty words. A picture of a situation and of a line of action cannot be expressed if

there is not a definite meaning connected with the words. Therefore it would seem that the analysis of the conception of a right must be wrong in some respect, since it is obvious that rules are effectively laid down by means of this conception.

The answer to this objection is the following. The power which is labelled a right is really non-existent. It is an empty word. But the power is thought to be a power to *do* something. It refers to an imagined action. If this action is clearly conceived a rule is really laid down through the proclamation of the right. The *pattern of conduct* is contained in the idea of the action, or actions, which the possessor of the right is said to be entitled to perform. The expression "right", on the other hand, has here the function of an *imperative* expression. Its meaning is: the person in question shall be able to do this, his action must not be interfered with, other people may not perform the same actions with regard to the same object except by his permission, his demand in this or that respect shall be complied with etc.

The possible combinations are almost countless, and the patterns of conduct are often very complicated, even if the rules on the face of it seem to be rather simple. These questions cannot

be discussed here, but a couple of examples may be given in order to illustrate what has been said.

The law says e. g. that the owner of the land bordering on a lake shall have the exclusive right to fish in that lake. This means a pattern of conduct for all persons other than the owner (i. e. the person who has a legal title to the land) to abstain from fishing in the lake and from interfering with the owner's fishing. The pattern of conduct is imperatively expressed by saying: the owner has an exclusive *right* to fish. With this rule are connected other rules which lay down what is to be done if the first rule is broken: the transgressor will be punished and damages extracted from him.

Or a law says that a worker has a right to compensation from his employer if he suffers some injury during his work. A pattern of conduct for the employer is here drawn up: to pay a certain sum to the worker if he has suffered an injury and has laid claim to a compensation. And the pattern of conduct is imperatively expressed by saying that the workman has a *right* to this compensation. Here, too, the rule is of course connected with other rules regulating the course of action to be taken if the compensation is not paid voluntarily.

In this way it is shown how it is possible to

lay down patterns of conduct by means of proclamations about rights in spite of the fact that the power constituting the right is non-existent. But another function of the notion of right must also be pointed out in this connexion.

This is that the notion of a right is used as a means of exciting or damping down feelings. Above all, in conflicts of every kind the idea of having a right to the object in dispute serves to fortify the courage on one's own side and to beat down the will-power on the other side. This is the case in every war. The same is true of the class-struggle. An oppressed class puts on its banners that there is a *right* to freedom, to a full compensation to everyone for his labour, or something like that. A privileged class asserts with equal vehemence the inviolable right of property, perhaps the sacred rights of the monarchy with which it is connected etc. Assertions of this kind have a considerable effect on the population. They help to close the ranks of each party and to stimulate confidence. On the other hand these assertions reach the ranks on the opposite side and often serve to undermine their belief in their cause, e. g. when members of the propertied classes in their innermost soul come to acknowledge the rights of the proletarians to equality.

Now in order to fulfil this function of stimul-

ating and discouraging there is no need for the notion to correspond to a reality. The simple cry of Hurrah! may serve to raise the spirits of an attacking force. What is needed is not a true picture of the actual world but a stimulant to the feelings of activity and courage or, again, something which has a depressing effect.

The notion of a fictitious power as it figures in the law.

When we clearly recognise the fictitious nature of the power called a right, it is easily understood how the legal title — by virtue of the law — can be imagined to constitute a right. Were the right to be identified with actual power it could not be said infallibly to be established or arise whenever a certain event defined in the law takes place. It could only be said that if the law were conscientiously applied by the judges etc. certain consequences would follow. The if's would be many, including the economic position of the holder of the title, the ability of his advocate etc. The situation is totally different when the right is conceived as a fictitious power. Then nothing prevents people from imagining that the law is able to determine with absolute infallibility its coming into being — since it exists only in imagination. The same is true, of course,

of the transference, the modifications and the extinction of the rights.

In this way the whole of the legal language is explained. It constantly refers to imaginary powers and their counterpart, the imaginary bonds called duties. These are — in imagination — absolutely determined by the rules of law. When such and such facts have occurred, the right is there. When such and such other facts have come about, it is extinguished.

The fictitious power is easily ascribed to babies and lunatics. Since it is fictitious, it does not clash with the fact that babies and lunatics are totally incapable of having or exercising any power what so ever. Jurisprudence has taken much pain to explain the matter. It has appeared to be necessary to reconcile the idea of their having a power with their actual position in life. The trouble is, however, uncalled for. It is no use trying to prove, scientifically, that a baby can have an imaginary power!

The rights are often ascribed to fictitious entities also, the so-called juristic persons. A company, a municipality and other organisations are said to have a juristic personality of their own. The meaning is that there is, "in the eye of the law", a separate person (not to be identified with the members) to which the rights of the

organisation belong, on whom its duties are incumbent.

The orgy of speculations indulged in by jurisprudence when trying to explain the essence of these "juristic persons" is amazing. The speculations have been engendered by the belief in the reality of the rights and duties. As soon as it is realised that the rights and the duties are imaginary powers and bonds, all this scholasticism may be put aside. When the power or the bond is fictitious, it may, of course, be ascribed to a fictitious person as well as to a real one, and this is what has been done in jurisprudence.

Likewise the object of a right may be imaginary. This is the case e. g. with a patent. Nothing exists which could properly be qualified as the object of the right of the patentee. The invention itself is the demonstration that the laws of nature may be used in a certain way, e. g. by constructing an apparatus on a new model. It would be meaningless to describe the laws of nature or the notion of how they are to be utilised as the object of a power. Nor could the power have for its object the thing constructed. This thing forms the object of a right of property, not of the right of patent. No, the object of the right of patent consists in the action of constructing samples of the thing invented for sale (legal

technicalities may here be disregarded). Actions of this kind belong to the future. They are imagined only as objects of the right of patent. The right, in fact, is the imaginary power of solely performing these imagined acts. If anybody else performs the same actions, without due permission from the patentee, the right is said to be violated.

Many readers will no doubt be inclined to ridicule the assertion that the object of a patent right, bringing in enormous profits, exists only in imagination. It would be wiser, however, to keep different things apart. The profits are certainly a reality, and a very comfortable one, for the patentee. But the profits are obviously not the same thing as the right, nor are they conditioned by the question whether the right and its object is a reality or not. They are conditioned by the functioning of the legal machinery according to the law of patents. The right, it is true, is said to be regulated by this law. But it is not therefore a reality, any more than its object. These notions are used in the law simply as means of drawing up patterns of conduct for the judges and other persons. The important thing for the patentee is only that those who perform the imagined acts of constructing are punished or made to pay damages.

As a matter of fact it is a very common occur-

rence that the object of a right is something imaginary only. Take e. g. the case of a claim to the payment of a sum of £ 100. The object of this right, or imaginary power, is not this or that banknote. It is an imagined act of the person called debtor, consisting in the payment of a sum of £ 100 at a future date. The right is the imaginary power to claim — supposedly with absolute effect — the performance of this imagined act. If in real life the debtor does not act in compliance with this claim, some consequences unpleasant to him may follow. This is the important point for the creditor. In the long run the infliction of the sanctions has the effect that most debts are paid voluntarily. In the particular case the legal machinery is put at the disposal of the creditor to extract by compulsion whatever payment is to be had from the belongings of the debtor. To this end it does not matter if the right and its object are realities. What matters is the regular functioning of the legal machinery.

The notion of a right in the technique of the law explained with special reference to the nature of judgments in civil cases.

In order further to explain the technique we may continue to examine the relation between

debtor and creditor in the case of a loan. When a loan has taken place the law says that the debtor has a duty to pay the money back at the stipulated time, the creditor having a corresponding right to claim the payment. The immediate meaning of this is: the debtor shall be bound by an invisible bond, the creditor shall have an imaginary power to claim the performance of the imaginated act of payment. It is imperatively laid down that the duty and the corresponding right shall be established according to the contract. This presupposes that the law really has got the power to effect the coming into being of the right and the duty. From the standpoint of actual reality the statement in the law is absurd. No imaginary bonds or powers can be created by any means, not even by a law. But it is a mistake to apply the question of truth to the law, since its purpose is not to describe reality but to direct people's actions. To this end the statement is perfectly serviceable.

In the first instance the law tells the debtor something which he ought to do in consequence of the loan. The conduct desired is directly described and solemnly declared to be his duty — a declaration which is equivalent to the use of an imperative expression. In this way psychological pressure is brought to bear on the debtor.

Further, the imperative statement about the

rights and duties of creditor and debtor are intented to guide the judge in case of a dispute. Here the action desired is not, however, directly described. Civil law is immediately concerned with the conduct of the private parties themselves. But this does not prevent the law from being at the same time a guide to the judge too. The link between civil law and the action of the judge is supplied by judicial technique and by the law of procedure. The judge is trained to interpret the statement of civil law in a definite way, viz. as intending that under certain circumstances, defined in the law of procedure, he should give a judgment proclaiming it to be the duty of the debtor to pay the sum in question.

While the law of procedure contains the pattern of conduct necessary for the procedure, civil law gives the judge a pattern for the judgment. In order to decide and formulate the judgment he has to imitate civil law. In that law rights and duties are laid down in a general way. The judge lays down the same rights and duties as applied to the parties in the dispute. The judgment is therefore a *reiteration* of the law, adapted to an individual case.

This view of the nature of a judgment is not the one current in jurisprudence. The jurists generally maintain that the judgment refers to really existing rights and duties. This is the

obvious consequence of the underlying assumption that rights and duties are objective realities. The statement in the judgment about the rights and duties of the parties is interpreted as a judgment in the logical sense about these rights and duties. Since they are, however, imaginary entities, there is nothing to which the alleged judgment (in a logical sense) could be said to refer. It would refer to non-existing bonds and powers. Therefore it would hang in the air. For this and many other reasons it is absurd to attribute to the judge the function of determining actually existing rights and duties. His real function is not to describe reality but to direct people's actions. In this respect he is in the same position as the law-giver. He therefore makes use of the same technique: that of advancing imperative statements about rights and duties. The judgment may be defined as a law for the particular case, modelled on the pattern of the general law.

The definition must, however, be restricted to the case when the claim is fully substantiated so that the judgment is given in favour of the plaintiff. In this case only is the judgment a reiteration of civil law. When the claim is rejected, e. g. on the ground that evidence is lacking for some relevant fact, the judgment is based on the law of procedure. Generally speaking the law of procedure tells the judge to reject the

claim — definitely, or for the time being — when not every one of a number of conditions regarding procedure has been fulfilled, among them the condition that the relevant facts, for which the plaintiff has the burden of proof, have been established. The procedure is a kind of filter for the claims. Civil law is positively applied (i. e. reiterated) only in the case of those claims which pass through the filter.

When a claim is definitely rejected by the court, the matter comes to an end. The judgment debars the plaintiff for all time from getting his claim accepted by any court. According to the law of procedure the judgment will always be a cause for rejecting a new petition based on the same ground (the principle of *res iudicata*). But when judgment is given for the plaintiff the legal machinery works on. The executive official now comes to the fore instead of the judge.

During this phase too we encounter the question of the practical meaning of an imperative statement about rights and duties. In the miniature law, the judgment, the concepts have the same function as in the general law. The judgment is an imperative statement about imaginary powers and bonds. Only these are now concrete, they are referred to the parties in the dispute. But the meaning of the judg-

ment does not stop at this. It is intended to direct people's actions just as is the case with the law. The persons concerned are chiefly the defendant and the executive officials.

With regard to the defendant, the judgment contains a renewed imperative concerning the payment of the stipulated sum, now with costs included. This new imperative is of momentous importance for the parties. Before the judgment there may have existed a reasonable doubt as to the interpretation of the law, as to the facts, or as to the possibility to prove them. Every doubt of this kind is now brushed aside. Under ordinary circumstances the case will not be tried again. Whether the interpretation made by the court is correct or not, whether the court has judged the facts correctly of not, the judgment will not be altered.

But this would not mean very much unless the judgment at the same time regulated the use of force against the defendant in order to extract payment. The judgment is an adaptation of the general rules to the individual case in this respect too. Unless the debtor pays voluntarily some of his goods will be seized at the request of the creditor and sold, the money being given to the creditor. The meaning of the judgment is to order this action.

The judgment does not directly describe the

action of the executive official. This matter is regulated by the law of execution. The judgment only indicates how much money is to be extracted from the goods of the debtor. If a judgment is given for £ 100, this is to the executive official a sign releasing action according to the law of execution aiming at the transfer of the sum of £ 100 net. His position in relation to the judgment is analogous to the position of the judge in relation to civil law. He has, according to juridical technique, to interpret the statement about rights and duties as indicating an action on his part. Only the actions are different. While the judge has to lay down a new rule, specially adapted to the case from the general rules, the executive official has to effect the actual transfer of property.

Thus the technique of the law and that of the courts, which is similar, are easily explained. The imperative statements about rights and duties are formally statements aiming at the creation of imaginary bonds and powers in an ideal world, "the world of law". They have their practical importance, however, through being at the same time rules of conduct for private persons, for the courts and for the executive officials.

The essence of the technique is that in imagination the rights and duties are interpolated between the relevant facts (e. g. the giving of a

loan) and the action of the judge. The intention of the law-givers is that a certain action on the part of the judge, i. e. a certain judgment, should follow upon the facts (when a claim has been legally made and substantiated). But the law does not directly say so. Instead the facts are said to give rise to rights and duties. The judge is then supposed to determine if these rights and duties really exist in a concrete case. What he actually does when the claim has been substantiated is to reiterate the relevant provisions of civil law, thereby setting a concrete pattern of conduct for the defendant and giving a sign for action to the executive officials.

The interpolation of the rights and duties is to a certain advantage for the technique of the law. The principal reason for this is that many different facts according to the law call forth the same action by the judge. This action may therefore be indicated in the same manner though the facts behind it are different. The claim for the payment of £ 100 e. g. may be founded on a loan, on a sale, on tort, or on something else. The action of the judge will nevertheless be the same and will be indicated by the same means: the idea of a right and a corresponding duty as produced by the facts in question.

The same thing is illustrated in the rules

regarding property. According to the law the right of property, i. e. an imaginary power over a thing, is "acquired" in a great many ways, e. g. through a sale, through a legacy, through a gift etc. From the right of property many legal consequences are derived, in that many rules are connected with the idea of someone being the owner of a thing. The rules about the punishment of theft, the rules about sales of goods, about mortgage, and what not, refer to such a situation. In every case the action of the judge, as intended by the law-givers, presupposes the existence of a group of facts, among which are those constituting a "legal title", i. e. giving rise to ownership.

It is easy to imagine the complications that would ensue if the conception of property were eliminated. Then the rules about theft, sale, and so on, would have to refer directly to the facts constituting legal titles of various kinds. The same facts would return in a great many rules, making the whole system extremely cumbrous. Theoretically it would be possible to construct laws on this basis but it would not be a practical proposition to do so. A great simplification is attained when the idea of property is interpolated. Instead of directly referring to a great many facts which have the same significance in relation to the punishment of theft and other

crimes, criminal law refers to the right of property only. But this idea in its turn points to the facts. It is used, so to speak, as a connecting link, or something like a telephone exchange, between the facts and the action of the judge.

The connexion between the imaginary notions in the law and in magic.

However useful the conceptions may be to legal technique, it must not for a moment be supposed that they have been purposely constructed to this end. On the contrary they have been inherited from a long past and only slowly evolved. They have been taken over by every new generation as belonging to the common stock of indispensable notions without their scientific validity ever being questioned.

No attempt shall be made here to explain the origin of the fictitious notions in the law. I only want to point out that Professor Hägerström has traced them back to magic. In his great work on the Roman concept of Obligation he has shown that the *"obligatio"* was a mystical bond, a *"iuris vinculum"*, from which the debtor could free himself through the payment of a certain sum. The bond consisted in a supernatural power that the creditor held over the debtor, and it arose from acts or words with a magical signi-

ficance. If the debtor did not free himself through payment, the power of the creditor was allowed to be transformed through due procedure into an actual power over the body of the debtor. The right of ownership was a supernatural power over a thing. The old formal transactions of the law such as e. g. *mancipatio* and *stipulatio* are clearly magical, designed to create or transfer the supernatural powers. Jurisprudence, founded by the priests, was chiefly a science about these powers.

Magic was, of course, most prominent in the old law. Later on the importance of formality was lessened and the original way of thinking was somewhat blurred. Through influence from Greek philosophy an ethical element was introduced which was wholly unknown to the old jurisprudence. The effect of this was, however, only superficial. Fundamentally the classical jurisprudence of the first centuries B. C. retained the old conceptions and methods. But the phrases about jurisprudence being an "*ars boni et aequi*" etc. have largely determined the outlook of modern interpreters of Roman Law.

Overwhelming evidence is produced by Hägerström in support of his explanation of the Roman Law. I have no doubt that the same sort of explanation must be given of primitive law on the whole. The magical conceptions are very

different at different times and among different peoples. But the magical way of thinking is probably a common feature in primitive law.

By this I do not want to suggest that the fear of an automatic supernatural sanction was the sole, or even the chief, element in upholding primitive law. Professor Malinowski has shown in his work "Crime and Custom in Savage Society" (1926) that this is not the case with the Trobrianders. Very probably the same is true as regards primitive law generally. Oversimplification should be avoided in dealing with these matters. In primitive as well as in modern society the forces upholding the law are many and complicated. I only want to suggest that the notions of the law, such as the right of property etc., are of a magical character. This has been definitely proved, to my knowledge, only as far as concerns Roman Law. The evidence available about primitive law in general seems, however, to point in the same direction.

It would be a mistake to identify modern conceptions with those of primitive society. There is of course a great difference. The buying of a box of cigarettes in our days is not surrounded by the same sort of beliefs as the ceremonial mancipation of a slave in ancient Rome. But the affinity is probably greater than is

generally realised. The chain of development has never been broken. We cannot say: here magic stops and wholly rational thinking begins. Modern thinking in legal matters is far from being wholly rational. We actually use the notions of rights, duties etc. without being aware of the fact that these notions are imaginary.

Perhaps we should come as near as is possible to the truth if we were to say that we have retained the outer structure of magic in legal matters while the specific belief in supernatural forces has faded out. We speak of rights and duties being engendered through contracts or other acts, meaning that imaginary powers and bonds are thereby created. But we do not properly believe, as far as I can see, that something of a supernatural order actually happens. It should, however, be kept in mind that modern thinking is not consistent. Many variations are to be observed. In crowning the English King crude magic is used and somehow believed in, even if only half-heartedly. On the other hand who would speak of magic when two banks write off a series of mutual claims? Between these two extremes there are many varying shades. This matter would, however, require a special study. For the purpose of the present

treatise it is enough to point out the fact that we use imaginary notions in the law and to explain how we use them.

Why the imaginary nature of the right is overlooked.

It may be asked, however, how it is possible that we can use imaginary notions in this way and to this extent without being aware of the fact that they are imaginary. The explanation is not hard to find. In the first instance we may point to the importance of habits of thought which have been transmitted from one generation to another since the earliest times. It is well known how deeply ingrained such habits of thought may be. We have only to point to the religious field for a comparison. Their power to defy, or even totally to exclude, criticism is often astounding. Here they are in addition reinforced by being embodied in the technique of the law. For this reason they become especially rigid. We cannot speak about the simplest legal matters without using the notions of rights and duties. No wonder that the rights and duties are accepted without reflection as being realities, even if nobody can grasp them.

Secondly, the interest is focussed on the practical consequences which are deemed to follow

from a right, not on the right itself. In practical life nobody troubles to ask if our legal notions correspond to reality. What matters is the security of the possessor of a right and his ability to set the legal machinery in motion. These advantages are highly appreciated since they form the basis for individual well-being, for power and wealth. The actual advantages derived from the law are, however, something different from the rights themselves. But since they are erroneously deemed to be dependent on the rights, the rights are as highly treasured as they are.

No true distinction is made between ideology and objective reality. The actual state of things is firmly believed to be bound up with the existence of the rights. The idea never enters people's heads that the rights exist only in imagination. The very existence of the legal machinery seems unthinkable without the rights. It is never realised that a social order, involving the same security, might be maintained even if nobody had the faintest notion of those imaginary powers, the rights.

The confusion between ideology and social reality is all the more easily made as the imaginary right is generally coupled with special security and with the actual ability to set the legal machinery in motion in case of infringe-

ments. The person to whom a right is attributed according to the law has, on the whole, a special position in these respects, in contrast to other people. The actual advantages seem to follow the right closely.

Thus the ingrained habits of thought are fortified by the apparent implications of the facts. But the facts are misinterpreted. The advantageous position of the possessor of a right (which in some cases he shares with people who have no right at all according to the law) is not actually a consequence of the right. For the right, being imaginary, can have no effect in the real world. The advantages in question are principally dependent on the working of the legal machinery. This is what maintains the real security and furnishes the opportunities to have force used for the furtherance of one's own interest. The notion of a right as a psychological fact is certainly of importance in conjunction with the the legal machinery. It works for calm conditions in social life and supports the legal machinery. But this is something different from the assumption that the right itself is the cause or foundation of these advantages.

The notions of rights and duties are also extensively used without any connexion with the legal machinery. This is the case e. g. in international relations. The nations assert against

each other their sacred rights to self-determination, to equality, to compensation for injuries etc. Here the rights cannot be coupled with a legal machinery, since no such thing exists in the international field. Within the state too, sacred rights are often asserted without support of the legal machinery, and even in opposition to the rules actually upheld, e. g. in the class struggle.

In legal doctrine rights of this kind are generally labelled "natural rights", and it is often argued that they are not real rights but only an expression of wishes and interests. This is not, however, the correct way of putting the difference. It is overlooked that not even the so-called positive rights are real. Both kinds of rights are imaginary powers. The difference is only that the "positive rights" generally have a corollary in an actual security and an actual power in consequence of the regular functioning of the legal machinery. This parallel phenomenon lures even jurisprudence into believing that the positive rights are realities, and therefore the natural rights alone are depicted as unreal.

To popular thinking the natural rights are as real as the positive rights. To explain this we may here too point to ingrained habits of thought. Further, the emotional significance of the conceptions comes to the fore. The idea of being supported by a power of a higher kind

gives a sense of strength. It is dimly believed that this invisible power will sooner or later be transformed into an actual power. An idea of this being inevitable is embodied in the idea of a right. Therefore a man has a feeling of not fighting with his own strength only when he has the conviction of having Right to support him. Another force is engaged too and a force that must bring victory. In every war, in every struggle against oppression, this way of thinking is of the utmost importance. The adherents to a cause are stimulated by the feeling of strength and by the belief in inevitable success, the adversaries are subjected to a psychological pressure which may, sometimes, be very effective.

When the right is thus made a weapon in the struggle no criticism against the truth of the assertion of the right is favoured, since this would be regarded as undermining the strength of the cause. A general might as well encourage the dismantling of his guns! The adversaries may be inclined to criticism, it is true. But their criticism is not directed against the idea of a right as such. They only maintain that their right is the true one. For the neutral observer, who only wants to find out what is really going on, there is no place in either camp.

Finally, it is important to observe how closely the idea of a right is associated with the word.

A geometrical figure, e. g. a triangle or a square can be adequately described without using precisely the words triangle or square. The meaning will be exactly the same provided the description is accurate. But this is not so in the case of such concepts as that of a right. Here the usual word for expressing the conception is essential. We believe that this word signifies an objective reality, a belief which is an illusion, as we have seen. What we have in mind is primarily the word only. The imagined reality is not even clearly conceived. Therefore the picture is altered when the word is taken away and replaced by other words.

From the way in which the word is used it is apparent that it signifies a power. To have a right is represented as being able to do something, or claim something. But that power is unseizable and its nature seemingly cannot be adequately described without the word »right«. Something is lost when other words are used. We do not exactly recognise the right when it is not called a right but something else. The word therefore obtains a peculiar importance. It is identified with, or even stands in the place of, the thing which it is believed to signify.

This psychological situation helps to prevent criticism. Since the idea of a right is so closely attached to the word it requires a special effort

to isolate the idea from the word and look at it critically. Such an isolation is necessary if the meaning of the idea is to be realised. But the isolation is hardly ever effected, precisely because the right is not recognised as a right when described in other words. For the same reason a critical explanation of the notion is often rejected as unconvincing. The definition of the imagined right as an ideal or supernatural power is said to be beside the mark. It is maintained that this is not what we mean by a right. Even a clear exposition of the facts is often insufficient to overcome the psychological difficulty of separating the idea from the word.

IV

LAW AND FORCE

We now turn to the question of Law and Force. The reader will already have made the reflection that if the law is not binding in the traditional sense, if it is only a question of the psychological effect of some independent imperatives, if there are in reality no rights and duties — then what we call law must be essentially organised force. This is in fact so. The conclusion is inescapable if we keep to the facts.

It would be a mistake, however, to be content with such a general phrase. Statements of that kind are occasionally found in literature on law and social questions. But they are not of much value if the matter is not explained more thoroughly. I will here make an attempt in this direction, though only broad outlines can be given and these only in a fragmentary way. To start with it is suitable to call to mind the actual use of force which is made within the state organisation.

The actual use of force in the state organisation.

In every community force is consistently applied through the officials of the state, more particularly in three forms: — police measures against disturbances, infliction of punishment and execution of civil judgments. In all three cases physical violence or coercion is the ultimate expedient. It is used not only to disperse dangerous mobs if need be and to keep the peace generally. It is also an unavoidable instrument in the regular application of criminal and civil law. In criminal law, actual violence against the person of the criminal is used in the form of the death penalty and imprisonment. Even in civil law physical violence is sometimes used against a person, as e. g. when a tenant is ejected from the premises by means of force and when imprisonment for debt takes place. Generally, however, violence against a person is not needed in civil matters. Nevertheless, it must not be forgotten that physical force is the basis of execution in these cases too. Thus the goods of the debtor are seized by force if he does not deliver them peacefully when they are required in order to pay his debt. Physical force is resorted to in administrative law, also, when necessary. In the whole field therefore, the provisions of the law

are ultimately carried out by physical force or violence.

Actual violence is, however, kept very much in the background. The more this is done, the smoother and more undisturbed is the working of the legal machinery. In this respect many modern states have been successful to an extent which is something of a miracle, considering the nature of man. Under suitable conditions the use of violence in the proper sense is so much reduced that it passes almost unnoticed.

Such a state of things is apt to create the belief that violence is alien to the law, or of secondary importance. This is, however, a fatal illusion. One essential condition for reducing the application of violence to this extent is that there is to hand an organised force of overwhelming strength in comparison to that of any possible opponents. This is generally the case in every state organised on modern lines. Resistance is therefore known to be useless. Those who are engaged in applying force in criminal and civil matters of the ordinary kind are few in number, it is true. But they are thoroughly organised and they are in each case concerned with only a single individual, or a few individuals. Against any major assembly of subversive elements the military forces may be called out. These forces

fulfil the role of a "fleet in being", which is seldom used in open battle but nevertheless dominates the sea.

In the following I prefer to use the term force as including both actual violence and the influence exercised by the concentration of superior strength which, if needed, may take the shape of actual physical violence. The problem is to define the rôle of force, in this sense, within the law.

The contrast law-force.

According to an old and well-known line of thought law and force are regarded as opposite things. Force as such is put in opposition to law. In view of the extensive use of force, under the name of law, in the state organisation, this contrast is, however, obviously false. Law as applied in real life includes a certain kind of force. It is organised, regulated force used against criminals, debtors and others according to patterns laid down by the law-givers. But force as such cannot be opposed to a certain kind of force. The burglar and the murderer make use of force in committing their crimes. But it is impossible to deny that force is also being used against them when punishment is inflicted.

The false contrast is based on a metaphysical conception of the law. It is the conception of law

as including a supernatural power — the power to bind in the sense of imposing duties. This superior power is opposed to force, or actual power.

As soon as it is realised that law is nothing but a set of social facts, the whole distinction vanishes into thin air. Law includes force, or rather, there is in every state an organisation of overwhelming force, working according to the rules called law. By means of this organisation other forms of force are kept in check. The organised legal force is, of course, regarded in another light than force of an illegal character. It is generally supported by public opinion and surrounded by a traditional reverence since it is a necessary element in the organisation upon which our well-being and even our existence is based. But this does not alter its essential objective nature.

There is indeed a general tendency, more or less unconscious, to let the organised force of the law appear as something else than mere force. Its real character is largely obscured and this is done by means of metaphysical ideas and expressions. It is not bluntly said, e. g., that the function of the courts is to determine the use of force. Instead their function is said to be the "administration of justice" or the ascertaining of "rights" and "duties". Actually this is the

same thing. The statements of the courts concerning rights and duties are imperative statements, through which the use of force by public officers is directed. But this fact is concealed or put in the background by the judgment's being wrongly interpreted as a judgment in the logical sense about existing rights and duties.

In treating the law scientifically we must carefully distinguish between the different elements in the real situation. On the one hand we have organised force and the formalities under which it is exercised. On the other hand we have the reactions to this use of force in human minds and the traditional ideas concerning its nature. The mistake that must be avoided is to accept the traditional view as a representation of the facts, because this leads to a confusion between ideology and objective reality.

Is law guaranteed by force?

The metaphysical conception of the law is also presupposed when law is said to be *guaranteed* by force. What else could be meant by "law" in this connexion but law in the metaphysical sense, including an ideal or supernatural power? It would be impossible to maintain that the independent imperatives themselves are guaranteed by force, that these ex-

pressions and the pictures of imagined situations and actions which they convey are guaranteed e. g. by the measures of the police.

From a realistic point of view it is evident that what is guaranteed by the organised force is an actual state of things in the community: peaceful conditions in general, an existing distribution of power over land and commodities etc. This actual state of things is a consequence of the use of force according to the law. Without a continued exercise of such force it cannot be maintained. In this sense it is guaranteed by force. But the law is not identical with the actual state of things. It is a body of rules which (according to current opinion) determines what *ought* to be the actual state of things. This body of rules is regarded as being endowed with a vague and undefined power — the power residing in their "binding force", the power to create rights and duties. What is really meant by saying that law is guaranteed by force is that this power is backed by actual force.

The same idea is contained in the usual saying that *rights* are *protected* by force. The expression "right" does not, of course, here refer to the actual position usually enjoyed by a person to whom a right is ascribed. What it does signify — here as always — is an imaginary power. In some vague way this imaginary power is thought

to be protected through the sanctions. Since the power in question does not really exist, except in imagination, it cannot actually be protected by any measures in the real world. What really takes place is that as a consequence of the regular application of force in accordance with the law a favourable position is usually (though not always) created for the person to whom a right is legally ascribed. In other words, one effect of the legal machinery is to create — in most cases — a counterpart in objective reality to the imaginary power. But this is something different from really protecting the non-existing power included in the right. Therefore it is no true description of the function of force to say that it consists in giving protection to existing rights.

The distinction between primary and secondary rules.

On the basis of the idea that law is guaranteed by force, civil and criminal law is usually divided into two kinds of rules on different levels: primary rules, or substantive law, and secondary rules. The primary rules are those which lay down rights and duties for citizens, declaring e. g. that the buyer of a thing acquires a right of property over it and that such acts as murder, robbery etc. must not be committed. The secon-

dary rules are those concerning sanctions to be applied when the primary rules are violated. They order the judge to determine a sanction and other officials to execute it.

To some extent the division corresponds to the formulation of laws concerning civil matters. They are generally expressed as rules about rights and duties for private persons. The secondary rules, however, are for the most part not formulated at all in the law. It is only prescribed e. g. that property shall be acquired in such and such a way and it is left to the judge to draw the consequences of this statement. By means of rules of interpretation and legal technique in general he has to transpose the rule in order to get a rule for his own action in a case brought before him (a "judicial" rule).

Criminal law on the contrary is generally formulated as rules for the action of the judge. In most cases it says only: murder, robbery and other acts shall be punished in this or that way. It is deemed superfluous to say expressly that these acts must not be committed. The so-called primary rules in this field are constructed by jurisprudence out of the rules for the judges.

The different formulations are, however, unessential. They are made for the sake of convenience and under the influence of legal tradition. It would be a bad argument to adduce the

formulations either for or against the theory of the division of law into primary and secondary rules. The interesting question is whether this division is based on a real difference or not. Does the structure of the legal system justify our speaking of two sets of rules on different levels?

The answer must be in the negative. Civil and criminal law consist of rules which are at the same time rules for the conduct of private persons and for the actions of officials. The legislators aim at imposing a certain behaviour on the general public. But a necessary means to this end is to give rules about the use of force by members of the state organisation.

When rights and duties for citizens are laid down in civil law the meaning is not only to put a pattern of conduct before the eyes of the public. It is also to give rules for the adjudication of civil cases. But the meaning of the judgment is essentially to determine the use of force. It either opens the way to executory measures or puts such measures definitely out of question. Civil law is therefore a body of rules for the use of force by officials, as well as rules for the conduct of private persons. It is obvious that the same is true of criminal law.

It is quite natural that the rules for the conduct of private persons are not formulated as rules of prudence, saying: if you want to avoid

this or that sanction, you should do so and so. The legislators do not want the public to abide by the law only from fear of the sanctions. It is desirable to create and maintain a feeling that the rules should be obeyed unconditionally. Therefore the imperative form is used. But this form must not be allowed to obscure the fact that these rules are only the reverse of rules about force.

The illusion that the primary rules have an independent significance is ultimately based on the belief that they really and objectively constitute those ideal rights and duties about which they speak. Therefore they are regarded as having a peculiar effect, which is irrespective of the use of force. The right exists — according to current opinion — as soon as the facts which are to give rise to it actually exist. It is antecedent to the eventual use of force in its "protection".

This alleged effect of the primary rules is illusory, since no rights or duties are really established through them. The sole effect of the rules is their effect on the minds of people — the citizens and the officials concerned, causing them to act in a certain way. The ideas of rights and duties are used as means to describe the actions desired and also to work on people's feelings. Only these ideas are realities — the imagined

powers and bonds called rights and duties have no objective existence. It is therefore impossible to base a scientific distinction on the assumption that some rules, in contrast to others, really give rise to such powers and bonds.

Law chiefly consists of rules about force.

Thus the traditional ways of defining the relations between law and force must be discarded. It is impossible to maintain that law in a realistic sense is guaranteed or protected by force. The real situation is that law — the body of rules summed up as law — consists chiefly of rules *about* force, rules which contain patterns of conduct for the exercise of force.

It must be kept in mind, of course, that at the same time the rules contain patterns of conduct for the private citizens. But these patterns, or rules, are only another aspect of the rules about the use of force, and those rules are the deciding factor. The citizens have to make their behaviour conform to them. Rules about "rights" and "duties" which are not also rules for the use of overwhelming force are of little avail in actual life. Rather than accept the traditional classification of rules as primary and secondary I should therefore like to call the rules about force

primary rules and the rules for the conduct of private citizens secondary rules. This would not be quite exact, however. In reality the rules of civil and criminal law are at one and the same time rules for the private citizens as well as for the use of force by the officials. It is only a question of different aspects of the same rules. But we are justified in defining law as rules about force, since everything turns upon the regular use of force.

Outside civil and criminal law, in administrative law, there is a vast amount of rules which are not directly concerned with the use of force (e. g. rules about education, health, communications etc.). Sometimes force is necessary even in this field, though on the whole the rules are applied by the officials in other ways. But all these rules presuppose an organised force behind them and they presuppose that force is used according to the rules of civil and criminal law. However important they may be in our time, they must therefore be regarded as an addition to that central body of rules which consists of the rules about force. It might be added that the constitution consists of rules which indirectly concern the use of force, in that they regulate the laying down of rules of civil and criminal law. In so far as the constitution regu-

lates the command of the military force and the police, it is directly concerned with the use of force.

The necessity of organised force.

Without doubt social life must be based on law. But not on law in the metaphysical sense — the imaginary law that stands above the facts with its "binding force". No, our social life is based on the actual law, on law as fact, the term taken in its widest sense embracing the organised force which is used according to the rules called law in a restricted sense.

This organised force is actually the backbone of our community as it stands. It is absolutely necessary for this purpose. We cannot conceive a community — at least not under modern conditions — which is not based on organised force. Without that there could be no real security, not even with regard to life and limb. The hidden reserves of hate, of lust for revenge, and of boundless egoism would break through in a destructive way if not held in check by the presence of force, immeasurably superior to that of any single individual or any private combination. Men need taming in order to live peacefully together. But taming on such a great scale as is required here presupposes unconquerable force.

Nor could the distribution of property be maintained without the help of force. One need not have seen much of the desperate struggle for gain, for wealth or for bare subsistence even, in order to appreciate the necessity of force to keep up the boundaries between mine and thine. The existing economic order would inevitably be destroyed through lawless plunder if it were not secured by force. The actual powers enjoyed by landowners, creditors, company directors and shareholders etc. are dependent on the use of irresistible force according to the law. Their powers exist in consequence of the regular functioning of the legal machinery as a whole and would collapse if this machinery ceased to work.

But it is not only in a capitalistic society that force is required for the maintenance of property relations. Even if all property were "vested in the state", i. e. put under the direct control of officials, organised force would be indispensable. The officials would certainly not be able to maintain their control unless they were backed by overwhelming force.

It is also an illusion that *equality* in the distribution of property would make force unnecessary. Suppose that a reasonable definition of "equality" could be arrived at and the distribution of property actually framed on that model, force would nevertheless be required. This can be

affirmed with perfect assurance without experiment, on the basis of elementary psychology only. There is no reason to suppose that people would accept such a distribution of property with complacency — if they had a choice, i. e. if they were not debarred by superior force from altering it. The longing to possess greater wealth and power than others is not to be eradicated from the human mind. In fact, it would probably prove more difficult to maintain an equal distribution of property than an unequal one, since it would presuppose a hitherto unknown curtailing of the egoism of the stronger, more enterprising and fearless members of the community.

Actually we need not resort to imagination in order to get a picture of the situation under a "law" which is not essentially a body of rules about the use of organised force. The international field supplies us with a picture of such a state of things. The so-called Law of Nations is a law of this kind. The rules that are proclaimed by writers and politicians as "binding" on the states in their relations to each other lay down rights and duties for them. But these rules do not correspond to any rules about the use of force by some "super state", or international organisation. Therefore they resemble only one side of civil law, viz. the rules that are concerned with the conduct of the citizens. But they

lack the other aspect of the law, that which constitutes its strength, the rules about force to be used by the officials.

It is superfluous to insist here on the consequences which follow from the lack of a common organisation of force in the international field. The ever-increasing armaments, the recurring wars and the latent threat of war even in times of formal peace are obvious signs of what the absence of such force really means. Eliminate the organised force within the state and the consequences must be similar, though still more disastrous. We have now at least an internal peace and security within the areas of the different states, guaranteed by their organisations. If they were taken away there would be a multitude of warring factions, and in consequence it would be impossible to maintain the economic machinery which is indispensable to meet the needs of our congested populations. In fact, we can only dimly imagine what would follow from the complete elimination of the organised force of the state. We have hardly ever the opportunity to watch such a development in actual life. Things are never allowed to get so far, because the urge for an organisation which alone can secure peace and security is too strong.

Thus the absolute need for organised force in our community is beyond all question. But how

does this force exert its influence on social life, in what ways, through what channels does it control our actions? Some cardinal facts concerning this infinitely complicated problem will be discussed below. The central question is that of the relations between the regular use of force and prevalent moral standards. First, however, it must be pointed out that the chief results of the use of force are not in the immediate but in the indirect effects.

The influence of force is chiefly indirect.

The immediate effect of the use of force is only to cause suffering to a number of persons who are put in prison or punished in other ways, or who are bereft of some property that they have had in their actual control. Further, the sanctions cause satisfaction to other persons in stilling their lust for revenge or securing to them payments of debts and fulfilment of other claims. These effects are, of course, important for those concerned. But it is a great mistake to suppose that the social significance of organised force is exhausted with these immediate effects. To take such a view means turning the whole matter upside down. The consistent use of force has far-reaching effects beyond those felt by the persons directly implicated.

If the social significance of organised force is taken to consist only in the effect of the sanctions in a number of individual cases we must suppose that people's conduct in general is not influenced by the existence of this force. This would mean taking it for granted that people live peacefully together and obey the law from motives unconnected with the use of force. The sanctions are then believed to be required only because in some cases unlawful conduct takes place, and their purpose is represented as being the "vindication of justice" or "redressing of wrongs" in these individual cases. This is the great fallacy. In order to gauge the social significance of organised force we must look beyond the individual sanction to its general effects on the community as a whole — on the conduct of everybody in the community.

The immediate effects of individual sanctions are relatively unimportant in comparison to the pressure exerted on the minds by the existence of organised force. The general consciousness of the fact that irresistible force is regularly and conscientiously applied according to the law has a far-reaching effect on our whole conduct of life. It forms one of the basic elements on which we build our whole existence. Every single person must take the constant use of force—which is wholly independent of his own wishes — into

account, just as he must take into account the climatic conditions of the country, or the means of subsistence which it offers. To disregard the law completely — and the law would be nothing but inane words if force were not applied according to its provisions—would be as foolish as dressing on the latitude of Stockholm in the manner of the natives in the islands of the Pacific. We reflect on the matter as little as we reflect on the necessity of wearing adequate clothing. The necessity makes itself felt so imperiously that there is on the whole no room for a choice. This unbending pressure on millions and millions of people, keeping their actions within certain boundaries, is of infinitely greater importance for the community than the immediate effects of the sanctions applied. The sufferings of some thousands of criminals, the transfer of property in a number of cases from debtors to creditors, is a small matter in comparison with the fact that people in general abstain from the actions labelled as crimes, pay their debts, etc.

For several reasons this indirect influence of organised force is easily overlooked. Especially in jurisprudence and legal philosophy the attention is largely concentrated on the individual sanction with a more or less total disregard of the indirect consequences. One reason for this

shortsighted view is that we do not regard fear of the sanctions as our essential motive for lawful conduct. It is therefore appropriate first to consider the actual rôle of fear in this respect.

The rôle of fear.

When we try to look inwards and examine ourselves we do not find fear in the foreground as a motive for obeying the law. This is especially true as regards the fundamental rules of civil and criminal law. Motives other than fear appear to our eyes, at least at the first glance.

Take e. g. the crime of murder. If we ask ourselves why we do not commit murder even if we have serious grounds for wishing somebody else out of the way, the first answer will not be that it is because we fear the punishment. We do not in the first place think of the punishment at all. The act itself inspires us with such a horror that it appears simply as unthinkable for us to commit it. We have no feeling of standing before a choice. Murder is out of the question. It does not enter our thoughts as an actual possibility. I do not, of course, deny that fantasies, more or less openly expressing deathwishes, are a very common feature, especially in the neurotic mind. But the act of murder is not in general reflected upon as a possible course

of action in real life, its advantages and dangers are not weighed against each other. Fear of punishment, therefore, seems not to be the motive that keeps us from making any attempts on other people's lives.

Likewise, it is not out of fear of prison that we do not steal from our neighbours. We refrain from stealing simply because it is dishonest. The act is generally excluded from our minds and we have not, therefore, a sense of making a choice when we refrain from touching the property of others.

The psychological situation varies in regard to the different types of crime, but it is a common feature that fear of punishment does not, at least immediately, appear as the chief restraint. In relation to civil law our position is similar. The moral feelings are not so sharply accentuated as with regard to crimes. But it is certain that the cause why people generally pay their debts, fulfil their contracts etc. is not primarily that they dread the sanctions which might follow. In the first line common honesty demands that one keeps a promise. Other motives, which are not immediately connected with the sanctions, come into play as well, e. g. the interest of maintaining good business relations etc.

With regard to such matters as the principal

types of crime, and the fundamental obligations of civil law, it may seem, therefore, that the conduct of the ordinary citizen is not based on the fear of sanctions. Apparently he abides by the law from other grounds and fear is not necessary to keep him in the right path. He would, in fact, resent it very much if anyone ascribed his respect for the law to the fear of sanctions. He would find this tantamount to qualifying him as being at heart a coldblooded, ruthless monster without a trace of morality. We do not appear to ourselves in that light, nor do we want to appear to others like that. And it is perfectly true that our immediate grounds for lawful conduct are something else than mere fear of evil consequences.

It is quite natural, therefore, that punishment is often regarded as concerning only criminals, without having a bearing on the conduct of ordinary reputable citizens. Their life is so to speak screened off from the apparatus of coercion. The use of force appears as something that does not immediately concern them but only other people who must be kept in check. In civil matters force does not, perhaps, appear as being so far away. But its significance is not fully appreciated. Its function is said to be the vindication or realisation of the "rights" of individual persons in a number of cases where the rights

have been infringed. The indirect influence of the constant use of force is therefore overlooked here too. Even if it cannot be totally disregarded, it does not enter into the picture of the community in its overwhelming, all-pervading importance.

The introspection on which this outlook is based, does not, however, go deep enough. It is true that we do not find fear of the sanctions as the immediate motive for lawful conduct. But this does not in the least exclude the possibility that the sanctions, or rather the knowledge of the fact that sanctions are regularly inflicted according to the rules of law, has a most profound influence on our attitude towards these rules. It would be astonishing if this were not the case. How could we escape from the influence of the relentless machinery of force, which was functioning when we were born and surrounds us during our whole life? Surely, it must leave deep impressions on our mind. But its effect is not necessarily only that of inspiring fear. And even so far as fear is of importance, it is not to be taken for granted that the fact is recognised.

To begin with, fear is never far away in our relations with the law even if it is not the immediate motive for lawful conduct. We need only think e. g. of how anxious parents are to

instil obedience to the law into their children! Is this for purely moral reasons only? Does not fear of the awful consequences of lawlessness play a decisive part? And how warily everybody must tread in order to gain and retain a decent livelihood and a good reputation! Fear of the sanctions is certainly not without importance for our conduct.

This does not, however, imply that we live under an ever-present sense of fear of the legal force. The psychological situation is normally of another kind. The human mind has a marvellous adaptability. It is intolerable to live under the stress of constant fear. Consciously or unconsciously we try to avoid it by adjusting ourselves to the prevailing conditions.

In order to avoid the burden of fear we have not only to abstain from unlawful acts, which would bring the police or the bailiff on our track. It is also necessary to exclude even the *thought* of such actions. This is a very important fact. If we let the mind play with tempting acts (e. g. of enrichment or revenge), involving breaches of the law, fear also is evoked, since the idea of a sanction, executed with irresistible force, is connected with the idea of law-breaking. Fear raises itself as a barrier against law-breaking. But we cannot go on harbouring ideas of law-breaking and at the same time combating them

with fear. This would have a disruptive influence on the personality. We simply cannot do so in the long run without endangering our mental health. The internal cleavage would prove too much. Therefore the dangerous wishes must be excluded from our mind. If we do not entirely succeed in doing this, they are at least relegated to the sphere of day-dreams, more or less completely cut off from our every-day activities.

Thus it is explained how fear of sanctions can have a dominating influence on our conduct without being actually felt. It stands at the door of the mind, ready to enter at the same time as the unlawful wishes. Peace of mind is retained only if both remain outside. We seek peace instinctively and on the whole with success as far as this point is concerned. Such is our psychological construction. Fear is not effectively excluded only by calculations about the possibility of getting off with impunity. Some uncertainty is always connected with such calculations. A secure peace of mind with regard to the law must therefore presuppose that the mind is thoroughly freed from thoughts which are apt to call up our fear of sanctions.

Needless to say, this result can only be attained under specific conditions. Above all, there must be some generally accepted reasons why the sanctions are inflicted just for the actions in

question. Otherwise, the exclusion of the dangerous thoughts cannot be successfully achieved. An internal cleavage of mind takes place. On the one hand the unlawful acts appear in a tempting light or people may even be driven to commit them for reasons of hate or pride or other feelings. On the other hand actual fear of the sanctions stands in the way.

When the situation is of this kind among considerable sections of the community the régime may adequately be called terroristic. Such a régime is characterised by the fact that fear of sanctions is the immediate and dominating motive for lawful conduct. It is well known how strict and unrelenting a terroristic régime must be if it is to be at all effective. Fear is insufficient as a barrier unless it is sustained by very drastic and unflinching menaces. Success on such lines is, however, always uncertain and dearly bought. The price must needs be not only the sufferings of those who are hit by the sanctions. It must also include an undermining of the mental stability of the population which results in a consequent weakening of the structure of the state.

There is probably never to be found a régime which for a long time is terroristic through and through. Such a state of things would be untenable. In fact the usual situation in what is called

a reign of terror is, that the bulk of the law, especially the fundamental rules of civil and criminal law, are accepted without fear's being felt as the immediate motive for obeying them. Only in respect of some parts of the law, e. g. political matters, has fear this function, and then vigorous efforts are always made to reduce its importance by means of propaganda.

Our moral standards and the law.

So much for the fear of sanctions. We have seen that the relative absence of fear under normal conditions does not imply that fear is without significance for the lawful conduct of people in general. On the contrary its importance has been shown to be very great though its influence is chiefly indirect and therefore escapes superficial observation.

With this we have indicated one way in which the pressure of the regular use of force is exerted. But it works in other ways too, chiefly through its influence on our moral standards.

As was pointed out above, our immediate motives for lawful conduct are generally of a moral character. We refrain from crimes primarily because the acts appear to us as wrongful. Further we feel it as a duty to fulfil contracts and to comply in other ways with civil law, to

show loyalty and obedience to the proper authorities acting within the law, and, last but not least, to follow the law simply because it is the law, even when its contents are in themselves morally indifferent. Now these moral ideas are largely determined by the law, i. e. by the regular use of force according to the rules of law.

In so far as thoughts of unlawful acts enter the mind and appear attractive, they are more effectively counteracted by the involuntary moral impulse than by cold calculations about the risks. An unconditional: "You shall not!" rings in our ears. "This is low! It is detestable!" Such independent imperatives and expressions of value beat down the tendencies to unlawfulness. And these ideas and the feelings which accompany them are to a very large extent — though not, of course, exclusively, — a consequence of the "administration of justice" through regular infliction of punishment and extraction of damages.

It might, however, be suggested that the relations between the law and the moral ideas are the very opposite to this — i. e. that the moral ideas are the primary factor and that the law is inspired by them. In fact this is the position generally taken up by jurisprudence and legal philosophy. The principal rules of law are repre-

sented as being based on "justice". This means either that they are founded on an abstract norm, existing by itself *in nubibus*, or that the law is founded on our *ideas* about justice. Both these ways of stating the case are incorrect.

It is hardly necessary specifically to refute the contention that the law is based on abstract justice. This view is too openly superstitious. The only question which need be discussed is whether the *ideas* of justice are the primary factor in regard to the law or whether they are fashioned by the law.

When discussing this matter the first thing required is to frame the question in such a way that the issue is not from the beginning turned into a hopeless muddle. We must above all keep in mind that law is nothing that exists by itself outside human minds and actions. It is in reality a mass of "independent imperatives" governing the activities of officials and other people. The question of the relations between the law and our moral standards cannot, therefore, be scientifically framed as concerning the relations between two clearly distinct entities — a law existing by itself and a set of moral ideas as something entirely different. Those ideas which we refer to as the law are closely interwoven with the so-called moral ideas. There is necessarily an intricate interplay of human ideas, feel-

ings and activities, a reciprocal influence of individuals on each other. It will therefore be necessary to divide the problem into two separate questions. In this manner only can it be scientifically treated.

The first question is how the moral standards of every single individual are fashioned and what is the influence of the use of force according to the rules of law in this respect. Everybody grows up in a community where a legal machinery has existed since times immemorial. The question concerns the influence of this machinery and its rules on our moral ideas. The second question concerns the part played by moral ideas in the formation of new rules added to the already existing body of rules of law. To begin with, the first question only will be discussed.

With regard to this question it seems obvious that it must be answered in the sense indicated above. Our upbringing makes this unavoidable. The character is necessarily formed under the influence of our surroundings, especially in earlier years. The society where we live puts its stamp on our ideas. But among the forces working within society the law is without doubt one of the foremost. The law certainly cannot be a projection of some innate moral convictions in the child or the adolescent, since it existed long before he was as born. When he grows up

and becomes acquainted with the conditions of life he is subjected to its influence. The first indelible impressions in early youth concerning the relations to other people are directly or indirectly derived from the law. But the effect is not only to create a fear of the sanctions and cause the individual to adjust himself so as to be able to live without fear. The rules also have a positive moral effect in that they cause a deposit of moral ideas in the mind.

The rules of law are independent imperatives. In that form they are communicated to young and old. You shall not steal! — of this type are the rules concerning our behaviour. Now these imperatives are (so to speak) absorbed by the mind. We take them up and make them an integral part of our mental equipment. A firm psychological connexion is established between the idea of certain actions and certain imperative expressions, forbidding the actions or ordering them to be done. The idea of committing e. g. theft is coupled with the idea of an imperative: you shall not! Then we have a moral command with "binding force". We speak of a moral command when an independent imperative has been completely objectivated and therefore is regarded as binding without reference to an authority in the outer world. The chief imperatives of the law are generally transformed in

that way. Only when this is the case is the law really firmly established.

A moral influence of the law is required for its effectivity only in respect of a limited number of fundamental rules, and only in these cases is such an influence possible. For the rest it is enough that the idea of a moral obligation to abide by the law as such is sustained and that it is not damaged by unreasonable laws or arbitrary jurisdiction.

Several things explain how the rules of law can thus be absorbed by the whole people. The suggestive effect of the imperatives is enormous when there is power behind them — here the majestic power of the state, working relentlessly according to the rules about sanctions. This power is surrounded by august ceremonies and met with a traditional and deep-rooted reverence. All this combines to make a profound impression on the mind, causing us to take the fundamental "commands" of the law to heart as objectively binding. We do it all the more readily since we understand, at least instinctively, the necessity of these rules for the maintenance of peace and security.

The absorption of the imperatives cannot, of course, be effected under all circumstances. On the contrary, it is possible only under specific conditions, which ought to be thoroughly studied.

Broadly speaking the first requirement is that the rules appear as reasonable to most people, i. e. as furthering ends which are generally recognised as desirable. Otherwise the rules will have no moral effect or may even arouse moral indignation. Also it is necessary that the application of sanctions is regular and fairly impartial.

It seems impossible not to admit that those are, in brief words, the relations between the law and the moral standards of the individual. The law is the primary factor. The individual is caught in its grip from the earliest stage in life and his moral ideas are developed under its influence. The law — including the regular use of force according to the rules — is not, of course, an isolated factor. There is never a single cause for such a complicated thing as our moral ideas. The causes are necessarily manifold. Above all, the use of force must be associated with propaganda, preparing the minds for the reception of the imperatives, and there must be a direct inculcation of the imperatives through parents, teachers, superiors etc. What is suggested here is merely that the use of force is one of the chief factors in the moulding of our moral standards, and not the other way round.

The suggestion really needs no other support than a reference to obvious facts. It cannot be seriously maintained that our moral "commands"

are something outside the natural world. This would imply that they were of a divine character. As a matter of fact they are entirely natural phenomena: they are the contents of ideas in human minds and nothing else.

If we are not completely blinded by prejudice or hampered by habits of thought it is impossible to overlook the connexion that must exist between our moral ideas about murder, theft etc. and the fact that sanctions are, and have for a long time been, inflicted as a consequence of such acts. And the connexion must be of the nature described here.

If this is denied it must be presupposed that precisely those moral ideas which correspond to the law — e. g. the law of to-day — are innate in Man. Such an assumption is not only arbitrary — it is demonstrably false. The law varies in different countries and at different times and the moral standards vary accordingly. This would be inexplicable if they were independent of the law.

We can also observe directly that there are no innate inhibitions of a reliable character even against those acts which constitute the principal crimes. Thus it is not the case e. g. in respect of murder. To be sure there are some natural feelings, independent of the law, which stand in the way of our killing other people: love, friend-

ship, compassion, horror of suffering and death etc. But these feelings alone are not strong enough to put such a restraint on the incitements to murder as is necessary for civilised life in a community. There are always a great many people who are not very much hampered by them. And among people in general, who are not of a peculiarly pitiless disposition, those feelings are often overcome by other motives, especially the instinct of self-preservation.

Throughout history several forms of killing have even been highly appreciated as virtuous acts. The leaders of states have never experienced any serious difficulty in inducing people to kill each other in war. Where are the natural inhibitions here? What is their force? The state of war implies that those who occupy the key-positions switch over the moral pressure exerted by the legal machinery in another direction than the usual one. The killing of enemies is not only glorified — the abstention by soldiers from killing is sanctioned by the supreme penalty. Through force and propaganda an enormous pressure is brought to bear on the whole population, directing them to cooperate in the task which now supersedes all others: the achieving of victory.

Here we have the clearest possible illustration of the effect of the law on our moral standards.

We can see with our own eyes how the conceptions of right and wrong in reference to killing are changed overnight through the influence of the law. The innate restraints on killing are not strong enough to withstand this monstrous pressure. Only among an infinitely small number is there a resistance against war-morality. But in them the resistance is not based on those feelings alone. They must be fortified by a fanatical creed, opposite to the dominating one, in order not to be swept away by the torrents of war-propaganda.

Another example is the attitude in respect of property. Have people really a natural, innate propensity to abstain from appropriating through cunning or violence the wealth that they desire? Certainly not. In so far as it can be done with impunity, people have nothing against enriching themselves at the expense of others, and delicacy as regards the means is restricted. As a matter of fact, the struggle for gain between individuals and groups is kept within bounds only and with great difficulty through the law. Unfettered egoism would lead to anarchy if it were not kept in check by the regular use of force and the propaganda associated with it. As soon as the pressure is lifted at some point or other, the opportunity offered is ruthlessly exploited.

It is wholly inconceivable that the general attitude towards other people's property now prevalent in our community could be independent of the law and the legal machinery. The existing division of property is determined by the law. Obviously we cannot assume that there are any natural inclinations, independent of the pressure exerted by the law, to respect precisely this rather hazardous order, which confers great wealth upon some of us and extreme poverty on others. Nobody can have any doubt of what would happen if the pressure of the law were removed. Is it not therefore incontestable that those moral ideas which constitute the immediate obstacles to taking other people's property are formed by the law?

From all this it is obvious that the machinery of force does not only concern the law-breakers. It is not only needed in order to hold them in check. It is necessary in order to shape the morals of the ordinary citizen. Even if he does not suspect it himself, even if he is outraged at the suggestion — his standard of morality, which he is wont to ascribe to his own excellent qualities, has been largely determined by the fact that sanctions are in regular use in the community. Take away those sanctions, abolish the machinery of force, and his morals will undergo a profound change. They will be adapted to the

new state of things, where the individual cannot rely on an organised force to protect him. His morals will tend to fortify him in the struggle for existence which now takes place under conditions entirely different from those under which his old morals were suitable. Many acts, which in the quietude of a lawful society he despised or abhorred, will now appear as the necessary and permissible and virtuous means of maintaining himself and his family. To deny this is an expression of narrow-minded, blinded self-righteousness. Every major catastrophe, such as a war or a revolution, furnishes abundant proof.

The influence of moral ideas on the law.

It was pointed out above that the problem of the relations between the law and our moral standards must be divided into two separate questions, which must be kept apart. I have now tried to sketch an answer to the first of these questions, that about the relations between the moral standards of the individual and the law actually in force. It has been shown that the law is here the primary and stable factor. Obviously every one of us has had his moral conceptions fashioned by the influence of the law, and a continued application of the law is necessary to maintain them as actual guides for our conduct.

The second question concerns the influence of moral ideas in the establishing of new rules of law. This question must be treated in the light of the answer to the first one. Those who attain a position enabling them to influence legislation or the development of case-law have naturally been subjected to the pressure of the existing law just like everybody else. They start with a set of ideas acquired in this way. To the stock of moral conceptions derived from the law others are added through religious or social propaganda or grow spontaneously out of one's feelings and experiencies. The question now before us is this: to what extent do such moral ideas help to bring about change in the existing law?

Moral ideas are certainly prominent among the motives that dictate new laws, especially among the motives that are officially recognised. It is a frequent argument for a change in the law that the change in question is demanded by considerations of justice. But these moral ideas are obviously only one motive among many. There are other driving forces, such as self-interest, and it is hardly necessary to point out how readily moral ideas serve as a cloak for such interests. It is therefore manifestly impossible to maintain that the sense of justice forms or, more generally speaking, moral ideas

form, the only, or essential, basis or mainspring of new legislation.

The real causes of alterations in the law cannot be ascertained except by careful analysis of the various motives which are openly adduced, or else can be traced, behind the acts of the law-givers. This leads us back to the causes of these motives. Whether the motives proffered are justice or expediency it will be found that they have their roots in such human feelings as fear, instinct of self-preservation, family instinct, desire for revenge, lust for power, compassion etc. The demands for justice are prompted by these feelings and by the reactions to the surrounding world which they give rise to. But the same sort of explanation applies to the reasons of expediency. They too have their basis in such feelings. In both cases due regard must naturally be paid to the prevailing material conditions and to the amount of knowledge actually possessed by the law-givers and by those influencing them.

It is obvious that a scientific explanation of the motives for new legislation must always be of this general character. The claims to justice are thus reduced to their proper proportions and placed in their proper context. It is then seen that what we are wont to term "justice" is nothing absolute. In fact, justice as a motive for

legislation is fundamentally in no way different from reasons of expediency. The appeal to justice is only a peculiar form for expressing wishes and demands.

To put justice and expediency in opposition to each other as separate reasons for legislation is therefore taking a too superficial view of things. No dividing line really exists between them. What we have before us in investigating the grounds for legal rules is a set of human conditions, feelings, wishes, ideas and activities. Among them ideas about justice play an important part. But they cannot be isolated from the other causes.

It can therefore hardly serve any useful purpose to discuss whether law is based on justice or on expediency. The question of the basis of the law (in the sense of the reasons for legislation) should be framed thus: what sort of feelings and ideas have supplied the motives for such and such legislation? Instead of classifying the motives under the simple headings "justice" and "expediency", these various feelings and ideas should be analysed and described. In this way the necessity of going back to the feelings behind the ideas should be brought out and stressed.

It is, however, of interest in this connexion to ask how far those feelings to which we attribute

a peculiar moral value put their stamp on the law, e. g. unselfishness, love, kindness, gratitude. What trace of them is to be found in the law? Are the fundamental rules of civil and criminal law based on them? Have they been decisive in forming the rules about property and contracts or the rules about punishment for murder, theft and the other chief crimes?

The answer must clearly be in the negative. Whatever is said about moral grounds for those rules, they are actually determined by other motives. The harsh machinery of the law is not steered by the feelings and ideals of Christian morality (which is, in the Western world, generally identified with morality as such). The feeling that really lies behind the punishment for murder, manslaughter, assault and similar crimes is chiefly fear for our own personal safety. We punish these crimes for reasons of sheer self-preservation. Who can doubt that this motive is immensily stronger than any moral grounds that may be proffered? And the moral grounds adduced are obviously connected with the instinct of self-preservation.

In respect of theft the reason for the punishment is obviously the necessity of making possible a secure and lasting possession of property, which is a condition for our subsistence. Contracts are endowed with sanctions, since otherwise

they would not be reliable enough to function as instruments for the transfer of property and other economic activities which are necessary in our economy. The feelings which lie behind the rules about property are fear of destitution, desire for material comfort, lust for power and the like. To defend them on any moral grounds, consistent with the ethics of Christianity, is a hopeless endeavour.

In the same way all the most fundamental rules of civil and criminal law are easily traced back to feelings which are generally classified as egoisti al. The rules are determined by self-interest, though a self-interest common to practically all, or to large sections of the community. If we look at the facts and not merely at the words, there is not much room here for essentially moral principles as motives for legislation. We can see this from the rules themselves, and the observation is confirmed by daily experience concerning legislation. Those who come into power are seldom philanthropists. And if they are from the beginning, they usually take a different view of things when they have power and are loaded with responsibility. Behind them are their followers and supporters, who look to their own interests with keen eyes and defend them with hard fists.

The part of these essentially moral feelings in

legislation seems on the whole to be confined to exerting a softening influence on the law. In the reforms of e. g. criminal law during the last hundred years or so, such feelings have no doubt been of importance. But we should not lose sight of the fact that they have pointed in the same direction as reasoned self-interest. A cruel criminal law is a danger to all. It is to the general interest, from a purely selfish point of view, that the sanctions are not more drastic than necessary. As soon as the most crude superstitions of ancient times began to fade away under the influence of critical reasoning, the incompatibility of torture and cruel punishments with self-interest was bound to become apparent.

In order really to gauge the influence of the essentially moral feelings on the law, it is necessary to ask how far they have left their mark on the law when they have come into sharp conflict with the self-interest of those who are in power. History gives us an answer to this question. Self-interest has always been dominant. When have, e. g., the rich and powerful prompted by moral reasons introduced laws aiming at a more equal distribution of property? Never. So long as they have been able without risk to keep their wealth to themselves, they have done it. Only under pressure from below has another policy been adopted. It is true that

idealists from the upper strata have often taken the lead in the movement for better conditions. But an appreciable result has been obtained only when the idealists have stirred the masses into action, so that the ruling class has found it advisable to buy them off with some concessions.

Summary of the preceding.

Thus the rules of law are not based on those feelings which are most valued from a moral point of view, according to current conceptions. The connexion between the rules and the moral standards is of another sort, as pointed out above. The rules are important means in the shaping of the moral standards. They serve to impress most effectively those moral conceptions that are required in order to make peaceful life in the community possible, to keep the intricate economic organisation going, and so on. We have need of these conceptions. That is why they are impressed on people through legislation. Or, to put it more precisely, the interests of those whose wishes determine the contents of the law require a certain set of moral conceptions, i. e. ideas of independent imperatives. The apparatus of legislation is used as a means of propounding such imperatives and making them effective.

An essential condition for the apparatus of legislation to have this effect is that the legislation controls the use of irresistible force. Here we have in a nutshell the answer to the question about the relations between law and force. Law consists essentially of rules about force, which are made psychologically effective in the ways briefly indicated above. The regular use of force according to the rules has the effect of shaping and maintaining certain ideas about right and wrong, together with education and propaganda. The contents of the law are the outcome of desires of the most varying kinds. But we can clearly discern that the principal rules of the law, which form the backbone of the system, are not based on those feelings that we generally call altruistic. Instead they are determined by the desire for self-preservation, for security, for power, and the like.

The answer only concerns the relations between actual law, law as fact, and force. This law, as we have seen, is a set of rules about the use of force. But the traditional problem of law and force is not discussed primarily with actual law in view. It concerns the relations between force and metaphysical law. It centres round the question in what way the binding force of the law, how right and justice, are related to force.

The solution of this "problem" is, however, also implied in the above exposition. Since metaphysical law is non-existent, it cannot be related to anything at all. The question about its relations to force is therefore meaningless. We can only ask about the relations between force, especially the organised force of the state, and the ideas of right and duty and justice.

Obviously no fixed relationship exists in this respect. The ideas about justice etc. may support the actual use of organised force in the community, or be opposed to it, or be neutral. Probably in every community all three attitudes are to found among different sections of the population and with regard to different aspects of the law. It is easily seen, however, that usually the ideas about justice are in harmony with the actual law to a very large extent. This is regularly the case in so far as the law is conceived as being favourable to the basic desires for security, wealth etc. To every unprejudiced observer the dependence of the ideas about justice on interests is patent. But the interests are fashioned in relation to our knowledge of what can be attained and how. Consequently they are liable to be deflected from their "natural" course through misrepresentation of facts. Further, the notions of justice can be directly influenced through propaganda, even in opposition to

existing interests. Those who have reached positions of power have therefore wide facilities of making the metaphysical right appear to coincide with the law as actually applied. In fact, the metaphysical right is generally successfully appropriated by the power-holders. It follows the actual law like its shadow.

A further question, which will not be discussed here, is how people succeed in using organised force as a means of satisfying their desires, how sufficient collaboration is established etc. We must confine ourselves here to stating that ways of doing this are actually found by mankind, even though the chain of cause and effect is not clearly perceived, or grossly misrepresented. This is no more surprising than the fact that bees and ants are able to build their homes without the help of architects.

The monopolisation of force.

After this exposition the necessity of organized force, which has been stressed above, is still more apparent. Nothing could be more foolish than the cry for the abolishing of force. One might as well argue that it is desirable to take bread away. With a realistic conception of the world the practical question can only be how

force may best be used in order to further common ends.

Force is as dangerous to Man as fire is. It is as destructive to him and to his means of subsistence as fire when it is let loose. But just as fire must be taken into the service of Man if he is to raise himself above the level of the animals — so force must be taken into his service if he is to achieve a higher grade of civilisation.

Violence will breed violence, it is said not without justification. But this proverb is only partially true. It is not true of regulated force, used to serve common ends, according to fixed rules, without rancour or greed in those who exert it. Force of this kind does not call forth strife or passion. On the contrary, it has a calming effect in that it damps down people's aspirations to a reasonable level and adjusts them into a certain balance or harmony. At the same time the use of such force inspires confidence that advantages gained under its protection will be securely retained, because it is believed that the force will function in the same manner in the future.

Two basic conditions must be fulfilled if force is to further the life and well-being of Man instead of destroying him. First, the use of force must be monopolised by an organisation. Secondly, the use of force by this organisation must

be actually canalised and harnessed by means of rules.

The organisation in question is that which we call the state. In legal philosophy the state is represented as an entity above the individuals, endowed with the attribute of sovereignty, i. e. with a supreme right of self-determination in relation to other states and of making and enforcing laws within its own territory. But the absurdity of this doctrine is apparent. It means that an imaginary power, a right, is ascribed to an imaginary entity.

The existing reality cannot be defined in such terms. What we find in actual fact is a vast organisation which has achieved a practical monopoly of force within a certain territory — a monopoly which does not consist in an exclusive *right* to use force but in an actual ability to do so, belonging to members of the organisation.

There is no such thing as a single "power of the state". Instead of this we find in real life a series of positions of power occupied by individual persons: at the top the chief of the state, the members of the government and of parliament, the judges and the administrative officials etc. They have, all of them, their own spheres of power. Power is always a power for a single person, acting alone or in conjunction with others. It is a personal power even when it is controlled

from outside in some way or other, which in fact it usually is. The judge e. g. has the power to put people in prison, to extract payment and to order the transfer of property. This is his own power. He occupies a position where he is actually capable of doing such things. But he can do it only under certain conditions, and he cannot use his power arbitrarily without incurring the risk of losing it and of incurring a penalty.

The fact that the organisation works according to rules gives a semblance of truth to the current metaphysical idea of a single "power of the state". The members of the state organisation attain their positions — in normal times — and leave them again as the rules prescribe. Power comes to them automatically when they are lawfully appointed, no special effort on their part being required. It therefore seems as if they were only wielding a power existing by itself. Further, their work is coordinated through the rules of law in such a way that they support each other, and they act, not according to their own whims, but according to the patterns of the rules. But all this must not be allowed to obscure the fact that there only exists a series of individual positions of power.

The powers of the members of the state organisation are of the most varying kinds. Not

all of them by any means include power to direct force. But those which do so constitute the core of the organisation: on one hand the government with the police and the military forces at their disposal, on the other hand the judges, controlling the activities of the executive officials. The use of force in our community is actually monopolised for these people. They can effectively direct the use of force, while nobody outside the organisation is capable of this to any considerable extent. This actual monopoly of force is the real basis of the metaphysical idea of sovereignty.

Such a monopolisation of force is absolutely necessary for civilised life. It is a vital condition for the economic and cultural activities which make possible the existence of the crowded millions of to-day and give their existence its peculiar form. The monopoly has therefore been established everywhere, more or less completely. So strong is the need for it, so invincible the urge to have it. The result is that the face of the earth is at present divided between a number of such organisations, which have achieved a practical monopoly within their own frontiers. The delimitation of the different state organisations from each other is also made and maintained chiefly through force.

The canalising and harnessing of force.

The monopolisation of force is effected by means of those rules which we call the rules of law. The power of the members of the organisation depends on the psychological effectiveness of these rules. But the same means are also used to achieve a regulation of force, to subject it to an actual canalising and harnessing.

From a certain point of view this statement may seem paradoxical. Apparently the law can only limit the *right* to use force. If an actual limitation, an actual harnessing takes place, this seems to be the effect of other causes.

It might be asked, e. g., how the law could prevent a man with a gun in his hand from firing it, or how it could prevent a general with an obedient army from setting it marching. To such questions the only answer seems to be that the law can do nothing but declare: you have no right to fire the gun at other people, you have no right to lead the army against your own people. But these limits of the right can actually be overstepped. And with that we are back to the eternal opposition between law and force.

This view, however, is one-sided and superficial. It is based on the metaphysical conception of the law as a power of a higher order. When we realise that the law is nothing but a set of

social facts, the whole question takes on a different aspect, an aspect conforming to the realities of social life.

Two mistakes are contained in the metaphysical view that the effect of the law as such can only be the establishment of rights and duties. First, this alleged effect of the rules is non-existent. The law gives expression, in an imperative form, to ideas of rights and duties, i. e. to ideas about powers and bonds of a metaphysical nature. But it cannot actually give rise to such powers and bonds. Secondly, the only effect of the law is its actual influence on the conduct of people. It has such an influence, partly through its own suggestive force, partly through other causes. Under certain circumstances it can therefore direct the actions of people. Consequently the use of force can actually be determined through the law.

It is not a serious argument to ask how the law could actually stop a man with a gun in his hand from firing it. This cannot, of course, be done. The simple fact is that force cannot be *absolutely* harnessed by means of the law. The effect of the law is always a relative one. It is limited and it can be achieved only under certain psychological and material conditions. There may be adduced many instances where the harnessing does not succeed. But this does not prove that

the harnessing is always impossible. Such a conclusion implies a patent error of logic.

We need only look about us in the community in order to realise that the use of force is actually kept within definite limits by the rules of law — not completely, of course, since nothing is absolute in real life, but to a considerable extent. The harnessing is carried at least so far that our existence is assured, and very often it is even amazingly effective, if we take the difficulties into account.

The harnessing of force is most completely effected in the field entrusted to the courts. The judge determines the use of force in matters of civil and criminal law. But his power to do so is kept within narrow bounds by the rules of law. In the terms of the law he has the right and the duty to act only in accordance with the patterns of civil and criminal law in conjunction with the law of procedure. If the imperatives of the law are psychologically effective, they confer upon the judge an actual power, but a power which can be used only if he acts, on the whole, in conformity with the patterns set out before him.

The force at the disposal of the judge is that residing in the executive machinery. This machinery is so constructed that it works according to his orders. But it works so only if the orders are given in a certain form after due procedure.

The judge cannot take the initiative himself. He must wait until a case is brought before him by a plaintiff or a prosecutor. The opposite party must also be given a hearing. The procedure must be conducted in public and according to rules of law, and finally the order must be given in the form prescribed for a judgment. All these conditions must, in the main, be observed by the judge if the order is to have any effect at all. Further, the judges are carefully selected and trained in order to ensure the greatest possible precision in the application of the law. Every judge is also under constant pressure from various quarters, especially from public opinion and from the threat of legal action through other judges in cases of more flagrant deviations from the patterns of the law. He is therefore personally interested in carrying out the application with due care.

Thus the power to direct force placed in the hands of the judges is narrowly harnessed and canalised. The possibility of achieving this result rests on the fact that power always depends on material and psychological conditions which are of a relative nature and therefore make the power relative. In the canalising and harnessing of force it is not really a question of limiting a power which is unlimited *per se*. On the conrary, the problem consists in building up a con-

centration of force of limited scope and subjecting its use to definite ends. This can be done because the conditions on which the power of directing force depends can be consciously adjusted to meet the needs. The chief instrument in this respect is the law. Obviously, however, the harnessing of force is a much more difficult problem than the monopolisation. Therefore it has not been carried through with nearly the same degree of completeness in the present-day world as has the monopolisation.

The meaning of a "reign of law".

The realities we have in mind when we speak of a "reign of law" are a state of things in which the monopolisation and the harnessing of force have actually been achieved. The demand for such a state of things draws its strength from a deeply felt necessity. The high value put on the "reign of law" has its psychological counterpart in the lurking fear of the frightful consequences of unfettered force.

This appreciation can only be more pronounced when the realities are seen as they are without any kind of illusion. The metaphysical ideas concerning the nature of the law (the "binding force", the rights and duties etc.) are therefore entirely superfluous as means of maintaining the

respect for the law. Nothing can be more effective in this regard than a clear insight into the actual facts.

The metaphysical idealisation of the law is a secondary phenomenon. It has its origin in the instinctive appreciation of the necessity of regulating the use of force. A conscious and scientific appreciation of this matter cannot therefore destroy or weaken the respect for the law. On the contrary a realistic conception of the facts entails that the fundamental causes for the maintenance of the law are allowed to work more directly, without passing through a stratum of metaphysical ideas and jungles of words, where there is always a serious risk of losing contact with realities.

The marxist theory of the state.

In marxist philosophy the role of force is represented in a way that is wholly different from the traditional one. While force is usually very much concealed the marxists, on the contrary, put great emphasis on its use in capitalist society. But they envisage for the future a state of things where no force will be required.

The marxist view on this matter is expressed in the theory of the state. According to this theory the state is an apparatus of coercion. The meta-

physical idea of a superhuman entity is entirely discarded. The state is described as an organisation of force. But it is maintained that this organisation, and its use of force, are bound up with the division of the community into antagonistic classes. It is a means for one class to keep another class in check. Thus in capitalist society coercion is used by the capitalists in order to suppress the working class and make their exploitation possible.

The underlying idea is that organised force is required only where there is a conflict of interests within the community. The state is used by the dominating class in order to resolve the conflict in its own favour. When this division of interests is abolished and a truly classless society has been established, the apparatus of coercion will become superfluous. It will therefore gradually disappear, or "wither away".

The outlines of this theory are to be found in the Communist Manifesto. It has been developed especially by Engels in his work "The Origin of the Family, Private Property and the State", and by Lenin in "The State and Revolution". To this day it is the settled doctrine of marxism. A recent, and very clear, exposition has been made by John Strachey in his book "The Theory and Practice of Socialism" (1936). Some quotations from this book, which conforms perfectly to the

classical theory, may serve to illustrate the meaning of the doctrine.

"The State", Strachey tells us, "is an apparatus designed for the purpose of coercing people to do certain things, and to refrain from doing certain other things. It is an apparatus for the application of force, or, as it is more usual to say, for enforcing law and order. For behind the policeman is the police force. Behind the police force is the police station, the jail and the condemned cell. And behind all these are the armed forces of the State ...."

Strachey then proceeds to inquire how it can be said that the state is essentially an apparatus for coercion. "This view can only be established by tracing the historical origins of the State. Human societies only threw up those social organisms which we call States ... when they split up into distinct social classes ... And the reason why the early tribal societies were stateless was because they were classless. All civilised societies take the form of States because they contain antagonistic social classes. For the function of the State is to resolve these conflicts of the classes in favour of the dominant or governing class which wields the State's apparatus of coercion".

The full definition of the State is given thus: "A State is ... an apparatus for the employment

of force on behalf of the governing class of any community which has split up into antagonistic social classes. Its function is to resolve according to the will of the governing class the social conflicts inevitable to such societies."

When the revolution has been completed and the workers have taken power, the state, i. e. the organised force, must still be retained, but it will be used for the purposes of the working class. The turn has now come for the capitalists to be suppressed by means of the state. "A working class State is a State wielded by the immense majority of the population and used to coerce a small (though at first very powerful) and rapidly dwindling minority of the population". The workers' state is, however, only a temporary structure. "As and when a truly classless society appears it can be done away with". The central idea of marxism is summed up by Lenin thus: "Our ultimate goal is to eliminate the state, i. e. every organised and systematic force, any force whatever against men".

The argument drawn from conditions prevailing in some primitive societies cannot be investigated here. Obviously it is a very complicated problem how social control is exercised in primitive societies, and the risk of drawing premature conclusions is particularly great because it is extremely difficult for us to get a comprehensive

understanding of their whole mentality. The chief question, however, is that of the function of force at the higher stages of economic development, where there exists an extensive division of labour. The marxist theory is mistaken here — both in its view of capitalist society and in its prediction about communist society.

It is quite true, as the marxists maintain, that law in capitalist society implies a system of organised force. They have seen through the pretence that the law is something else. Actual conditions in capitalist society have inspired them with so violent a sense of injustice that the current metaphysical ideas which conceal the use of force have been dispelled. Their mistake is to contend that the whole function of organised force is to safeguard the interests of a small group of capitalists. This view is manifestly one-sided.

As matters stand in capitalist society to-day the law and its regular application is a condition for the very existence of all, not to speak of their security and prosperity. When there is a division of labour, and especially when it is carried so far as is the case in modern industrialised countries, the population cannot be fed, clothed, housed etc. without an economic machinery which is highly intricate. But this machinery, as we find it in our present society, is based on law,

i. e. on a regular use of force. It is the pressure of the law that makes it possible for the producers tranquilly to control the means of production: the farmer his land, the industrialist his plant etc. Production could obviously not go on if their possession were interfered with. The law is also indispensable for the interchange of goods. Our intense trade is inconceivable without a law which endows contracts with so-called legal effects, i. e. prescribes the infliction of executory measures in case of non-fulfilment. Trade, industry, house-building etc. are further dependent on the credit system. But the credit system is based on the law, or, in other words, on the fact that organised force is put at the disposal of the creditor to extract payment if need be.

One might argue that a better economic organisation could be devised, that a planned economy should be substituted for the relatively free system now prevailing etc. But this is a wholly different question. Whatever reasons may be adduced in support of such proposals, they cannot alter the indubitable fact that the existing economic organisation, and therefore the use of force, is now the means of satisfying the economic needs of the whole population — as far as they are satisfied. Moreover, the personal security of everybody is conditioned by the regular

infliction of punishments and by the existence of a police force capable of dealing with any armed bands that might be formed.

If the exposition made in this book concerning the effects of the law is on the whole correct, the marxist theory is evidently in contradiction to the facts. The use of force in capitalist society is not a product of the division into classes. It may be an instrument for class domination — that is quite true. But it is something more than that. It is an instrument without which the people as a whole could not live. Class domination means that the instrument, beside providing the basis for the existence of the entire community, has been turned to the special advantage of some group, or groups.

The one-sidedness of the marxist view of capitalist society is a piece of revolutionary propaganda which serves to divest the existing law of its moral authority. But such propaganda cannot be effective on a large scale unless the situation of some important sections of the community is wholly desperate. Only then will people really believe that the law is only an instrument for oppression in the hands of the ruling class. Otherwise most people feel instinctively that this is not so, that the law, even if they are discontent with certain parts of it, is necessary for all. This is the background for

the splitting up of the marxist movement into a larger reformist section, which has abandoned the central idea, and a smaller section, now known as communism, which retains the belief in this idea.

Prediction about a future communist society is founded exclusively on the theory that the use of force is bound up with the division into classes. When this theory is exploded, the basis of the prediction is totally shattered. The prediction hangs in the air. It would therefore be a mere coincidence if it ever came to be true. But it is easy positively to show that this can never occur. One need only point out that the abolition of organised force would mean delivering over the community as a helpless prey to any group who choose to set up an armed organisation of their own. The marxist answer to this objection is of course that there will be no people of this kind in communist society. But who can guarantee this? Who can guarantee that there will never arise powerful leaders able to gather force around them and gain ascendency in that way? It is a wild dream that people could be so "changed" that this possibility would be for ever excluded. Organised force, subjected to rules determined by common interests, will therefore always be necessary if only to protect

the community against the formation of lawless, terroristic bands.

But organised, regulated force will always be necessary for other purposes too. It will above all be required in order to maintain with sufficient stability those moral standards which are indispensable for peaceful life in the community. The marxists have entirely overlooked the effect of the law in this direction. They have made the common mistake of presupposing that we follow the fundamental rules for social life from motives unconnected with the regular use of force according to the law. They have even been still more blinded on this point than many others for the reason that they regard the use of force in capitalist society as highly immoral. To them the idea of force in that society has been indissolubly associated with odious oppression and exploitation. It has therefore been impossible for them to see that our moral standards are dependent on the use of legal force. This explains how the marxists can envisage with satisfaction the disappearance of organised force, which would actually mean opening the cage where the human beast is kept in custody, making the law of the jungle once more supreme.

Political programs based on the idea of the abolishing of force are doomed to failure in so

far as attempts are made to put this idea into practice. A realistic policy — a policy that is capable of fulfilment — can only aim at altering the use of force in some way or other, not at its abolition.

That Lenin and his followers, despite their unrealistic views on the role of force, were able to carry through a revolution and maintain themselves in power is explained by the fact that they relegated the abolishing of force to the distant future. Their activities were entirely devoted to the realisation of the intermediate stage between capitalism and communism. At this stage force was required, according to their theory, in the shape of the "dictatorship of the proletariat". In building up and employing a machinery of force for this purpose they were not in the least hampered by their idea that the ultimate aim was the abolishing of force. On the contrary this idea supplied them with a moral justification for the most severe repression against their opponents. All that was done in this direction must have appeared to them as a relatively small matter in comparison to the great end, the establishment of a future reign of peace, where no repression, no force at all would find a place.

But the "withering away" of the state is a *fata morgana*. It will always recede to a further di-

stance when, according to the theory, it should already have been reached.

The same is true with regard to the marxist idea that *power* for men over men could be eliminated in a future society. That this is impossible follows from the fact that we must always reckon with the necessity of having an organised force. But this organisation will always include power for certain individuals to direct this force. There is no possibility of getting beyond this fact. If we say that the power should be vested in the whole people, we only cover up the realities with loose words. The actual situation will always be that a number of persons are in key-positions enabling them to determine how the force at disposal is to be employed. It is no argument to say that they "represent" the whole people. The idea of representation is one of those ideas which are freely used to conceal the facts and give them a more palatable appearance. What may exist, but very often does not exist, where people speak of representation, is the fact that a holder of power is under compulsion to use his power in the interest of others.

In the economic sphere too we must reckon with the necessity of individual positions of power. The slogan that the means of production should be placed in the ownership of all can never be realised. It is based on the metaphysi-

cal idea of property. The meaning is that the imaginary power, which is called the right of property, should be transferred from the individuals to the collectivity. This is, of course, absurd. The slogan is an adaptation for propaganda purposes of the old idea of rights.

What conceivably can be done in the direction indicated by the slogan is a reorganisation of the economic life giving the positions of power a different structure. But power cannot be eliminated. If the organisation is to be run effectively, there must always be some persons capable of actually determining, with practical effect, the use of natural resources, of plants, of communications etc. And these positions of power will, under every conceivable organisation, be dependent on a certain use of organised force.

The real problem is always how the holders of power should be compelled to use it in the general interest, not in their own interest or that of a small group. It would be futile to pretend to give an easy solution of this problem. But it is important to know that it can be solved. Experience shows it can, for we have abundant material to prove that power — even the principal form of power, that of directing force — to a very great extent *is* actually regulated, actually "harnessed". The solution can only be furthered by stating the problem clearly as it really stands.

Law and force in international relations.

The argument has tended to show that what we call law is actually a system of rules about force to be used by the members an organisation, the organisation in question, the state, having achieved a practical monopoly of force within a certain territory. It seems appropriate to conclude the exposition with a few words about the law said to govern the relations between the organisations, the Law of Nations.

It is obvious, as has been pointed out above, that this is not a law in the same sense as the internal law of the state. The Law of Nations is not a system of rules about the use of force through an overwhelmingly powerful organisation, since no such organisation above the states is in existence. The armed organisations stand side by side. With few exceptions, if any, their boundaries have been determined through war, or threat of war. The same factor is essential in maintaining the boundaries. In so far as aggressive tendencies exist within one state, they can ultimately be checked only by threat of war, or actual war of defence in case of invasion.

The use of force by the states against each other is not determined by any rules. Force is not monopolised here, it is not canalised and harnessed, but used irregularly according to the

particular interests prevailing in the different states.

Therefore there exists nothing corresponding to punishment in the international field. The acts of revenge and subjugation which occur here have nothing in common with punishment beyond the fact that they cause suffering. The measures are not ordered by an impartial judge, they are not inflicted according to rules of any kind, they do not follow regularly on certain kinds of action etc. Nothing but victory in the war determines which party will be "punished", nothing but the interests, the power and the possible inhibitions of the victor set a limit to what is exacted from the vanquished.

The absence of an organised super-state force also implies that the significance of international treaties is wholly different from that of ordinary contracts. A contract which is valid in civil law is backed by force. In case of non-fulfilment on one side, the other party can set the legal machinery in motion in order to extract damages. Therefore both parties have a real interest in fullfilling what they have promised in the contract. It does not pay not to do so. On the contrary, it would lead to greater expense and other inconveniences. Thus the function of the legal machinery creates a *constant motive* for the parties to a contract to act according to that con-

tract. No such ever-present motive, ensured by organised force, exists in respect of international treaties. The interest of the parties therefore varies according to the ever-changing situation in general. The fixed element constituted by the law of contracts is lacking.

Thus it is obvious that the essential characteristics of internal law, law in the proper sense, and of the actual situation created by its application, are absent in the relations between the states. Nevertheless we speak of a Law of Nations. What is the meaning of that?

Without doubt there exists a Law of Nations in the sense of a system of rules concerning the relations between states. These rules have partly been evolved through tradition and usage, and partly established by treaties, or rather, they are the contents of treaties. Here, as well as in the case of law in the proper sense, the rules are ideas of human actions, expressed in the imperative form. It is true that the system is not so coherent as the law of a modern state, but this is only a difference of degree.

These rules have been occasioned by the most urgent necessity. It would be quite impossible for states to exist side by side, especially under modern conditions, without any sort of regulation. Their relations must be adjusted in innumerable ways in order to reduce friction and keep

open the channels for economic and cultural exchange. Very strong motives therefore compel the leaders of states to follow the rules established, at least to a considerable extent. It is quite necessary to do so if complete chaos is to be avoided. To take only one example — the international exchange of goods on the present scale would clearly be impossible if the freedom of the seas were not generally respected in times of peace. When the Law of Nations is ridiculed, it is generally forgotten that we simply could not carry on as we do if certain of its chief rules were not generally observed among the nations.

From a purely legal point of view there appears to be no fundamental difference between these rules and law in the proper sense. What immediately interests the lawyer in his capacity of lawyer is to find out what patterns of conduct are contained in the rules and how the rules are to be supplemented when they do not cover a case in dispute. The international lawyer is concerned with questions of the same kind in dealing with the international rules.

The recording and commenting on these rules is a legitimate province of jurisprudence. It would also be a very interesting subject for scientific research to inquire into the motives for adhering to the rules and to discuss their practical effect. If we choose to summarise the rules

as the Law of Nations, there is no need to rake up a dispute about that, since it is only a question of words. The terminology is not without justification, since the content of the imperatives which make up the Law of Nations is analogous in many respects to that of the rules of internal law. The international rules are similar to one side of internal law, viz. to the rules for the conduct of the citizens, while they lack their counterpart, the rules about force to be used by the officials. But when the Law of Nations is described as real law, something more is implied: that the Law of Nations includes a power, a binding force of the same kind as internal law. This statement does not refer to law as fact but to law in the metaphysical sense. On this level a fundamental similarity is asserted between the two forms of law.

From the metaphysical point of view the essential effect of the law is that it creates rights and duties. But this effect, which as we know is wholly imaginary, is ascribed to the Law of Nations as well as to law proper. The Law of Nations is represented as as an ideal power of the same kind as law proper, possessing the same "binding force", creating rights and duties just as real. It is a secondary question, from the metaphysical standpoint, how the rights are protected, how the duties are enforced. Within the

state this is said to be done through sanctions, inflicted by the courts. In the international sphere the place of sanctions is taken by self-redress. Every state is a judge unto itself and also takes the execution into its own hands.

Thus it is law in the metaphysical sense which is of an identical nature in both cases. This line of thought has received an ideal expression, e. g. in the classical work of Grotius on the Law of War and Peace, which is generally regarded as the starting point for the science of the Law of Nations. His method is to enumerate the causes of action in civil law and then to apply similar rules to the relations between sovereigns. The guiding principle throughout is that in this field self-redress takes the place of redress by the courts. To every just cause of action in civil law there corresponds a just cause of war. Therefore a war is a just war when it is waged in order to punish, or to avert an injury, to extract damages, or to recover property. This means that a just war is placed on the same level as punishment and civil execution, and made to appear as something wholly analogous.

The system of Grotius is, of course, antiquated. Its naively exact parallelism between the just war and the sanctions of internal law is no longer generally accepted. Among the jurists treating the Law of Nations there is a great diversity

of opinion concerning its nature, and the place of war in its system. But it is no exaggeration to state that the basic conceptions of a "binding" Law of Nations, and of rights and duties created by that law, are still generally retained both in legal science and, what is more important, in public opinion. We are very far from a state of things where the nations assert their plain interests without the pretention of rights. With the idea of a right, however, is connected the idea that force may be used in order to vindicate the right, and must be so used, if the right is not to lose its significance. But the force available is only that of the state itself to which the right is said to belong, or of its allies. The idea of self-redress in protection of one's rights is therefore a living reality in international relations, and a very powerful one.

No more need be said in order to show that, according to current opinion, the relation between law and force is on principle the same in the international sphere as within the state. In both cases law, conceived as an ideal power, is said to be backed, or protected, by force. The difference is only that self-redress is forbidden within the state, while between the states it is still the ultimate expedient for the vindication of rights.

Such is the general ideological standpoint of

our days. In measuring its importance for the relations between peoples it is above all necessary to realise that the ideas of rights and duties have a double function here. On the one hand they create certain inhibitions against violence. But on the other hand they positively incite to violence.

The inhibitory effect of the ideas should not be entirely disregarded. I am inclined to think that a thorough investigation would reveal a greater restrictive influence of the ideas of international rights and duties than is supposed in many quarters. The cases where the restrictive influence fails leap to the eye, but not those where it works. We are apt to overlook the positive influence of such ideas as belong to our stock of seemingly obvious truths and principles of conduct. Our attention is drawn to violations of these principles, not to the cases where they are silently followed.

Beyond doubt, however, the inhibitions caused by the ideas of rights and duties in international relations are not nearly so reliable as those imposed by the fundamental rules of civil and criminal law. This is so because they are not supported by the uniform and unflinching pressure of a regular use of force, directed by impartial and conscientious judges.

For the same reason the ideas are not so uni-

form as those connected with internal law. Our notions of how the right of property is acquired, what it implies, what a debt means, what acts are criminal etc., are formed under the influence of the law. The same notions therefore prevail over the whole area covered by the same law. They are imposed with all the might and authority of the apparatus of the state. The confusion with the actual positions of power and actual bonds created by the regular use of force maintains the belief that the ideas about rights and duties are true, i. e. correspond to reality. Individual notions about rights, contrary to those fostered by the law, appear as untrue precisely because they lack the support of the state organisation and are therefore not connected with practical advantages or bonds. Thus the monopoly of force entails a far-reaching unification of ideas, by imposing a certain set of ideas and excluding others. (That the ideas in many essentials are similar in all civilised countries is explained by the fact that the need for imposing precisely these ideas has made itself felt everywhere.)

In the international field the situation is fundamentally different. The absence of a monopoly of force entails a diversity of ideas concerning rights and duties. Here no central power exists, capable of creating and maintaining uni-

form ideas, with corresponding exclusion of other ideas. Therefore vastly different systems are developed in different countries on the basis of their different interests. The alleged "rights" are essentially cloaks for these interests, embodying them in a halo of absoluteness, making them appear as something more than they really are — mere desires and demands of the leading sections of the countries in question. It is true that such ideas are often common to whole groups of countries. But when this is the case, their interests are certainly also similar.

When the Law of Nations is praised as an instrument of peace it is exclusively the *restrictive* influence of the ideas concerning international rights and duties that is taken into account. It is not realised that these ideas have an opposite effect as well. A restrictive influence may be exerted by the notion that *someone else* has a right which should be respected. But the idea of *oneself* having a right serves to remove inhibitions against violence, and even to incite violence in order to "protect" the right. It is very important to pay attention of the psychological function of the idea of rights on this point.

A firm belief that we have a right means, in the first place, that the actions to which we are deemed to have that right are regarded as permitted. No prohibitive "You shall not!" is

associated with the idea of performing them. But the belief has also the effect of producing certain feelings. As we have remarked before, the idea of having a supernatural power quite naturally gives rise to a feeling of strength, and confidence is inspired by the idea that this power ultimately *must* assert itself in real life.

The same ideas and feelings are connected with the use of force in "protecting" and "vindicating" our rights. These acts are also freed from the shackles of the imperative "no!" generally associated with the idea of violence and they, too, are accompanied by feelings of strength and confidence.

As regards rights of civil law, the so-called protection is afforded by the apparatus of the state. With few exceptions self-redress is penalised. This means that the negative imperative concerning violence (with the said exceptions) is absent only in respect of the acts of organised, regularised force through officials. The desire for the vindication of rights is satisfied through these acts, which are calmly and irresistibly performed. The feeling of strength and confidence gets associated with them, not with acts of violence on the part of the possessor of the right himself. In this way the feelings connected with the vindication of rights are given a reasonable outlet and at the same kind kept in check.

The feelings connected with the alleged rights of the states, on the contrary, are not kept in check through any super-state organisation, nor are they given a measured outlet in conjunction with the use of force by such an organisation. The state is deemed to vindicate its rights itself. It is regarded as entitled to use violence to this end, at least when it appears to be absolutely necessary (as is evident from the fact that every state keeps military forces). In other words, no prohibiting imperative is associated with the idea of violence in these cases (except by extreme pacifists, who are only a small minority when it comes to business). And feelings of strength and confidence in victory are associated with such violence, or the threat of making use of it. These feelings are even purposely excited by the leaders of states in order to augment their war-potential. Add now that the ideas about rights are under no control from outside the states, that they are chiefly determined by the interests prevailing in each state, that the different systems of ideas of rights are therefore sharply opposed to each other — and we get a notion of what the Law of Nations, and the rights of states, actually mean for the release of violence between peoples. Their effect in this respect is exactly the opposite to that of an instrument of peace. As a matter of fact, the ideas of rights and

justice are part and parcel of the armaments of every state. The situation is perfectly clear once the metaphysical conception of the law is discarded and the attention directed, not to this imaginary power, but to the study of the psychological function of *ideas* concerning law and the rights between states, and their connexion with the use of force.

A demand has arisen for the abolishment of force also in international relations, and for obvious reasons, since the unregulated use of force here prevailing implies the most dangerous threat to civilisation and lays a burden on humanity that seems to grow ever more heavy. An attempt to cure this evil was made through the formation of the League of Nations and the "collective peace system". Its professed aim was to put an end to war, and consequently to eliminate the use of the threat of war, or so-called power politics. The place of force was to be taken by the Law of Nations, which was to regulate the relations between peoples on the basis of justice. The purpose of the League is therefore adequately summed up in these words of an eminent authority: »The collective system means the abolition of force and the substitution of the rule of law".

Now it is obvious that the law referred to in this connexion could only be law in the meta-

physical sense. This superior "power" was to be set above the actual force of the states. The creation of something like a centralised world-organisation of force was unthinkable, and this was not attempted. The League presupposed the sovereignty of its member-states. But sovereignty is only attributed to organisations which have achieved a monopoly of force within a territory. Therefore the principle was that law, in the sense of "binding" rules, should govern the relations between states, instead of their relative strength, while the states maintained their character of armed organisations. Disarmament was to follow, though there was a difference of opinion as to the question whether security (based on law) should precede disarmament, or disarmament security.

In practice this could only mean an intense propaganda for the principles of the League with the object of creating among the peoples and their leaders the safest inhibitions against the use of violence. As we know, such a propaganda has been carried out on a large scale. But it has not borne the fruits expected. Its failure was inevitable for the principal reason that it lacked the support of a centrally organised force. Inhibitions of the character required here can never be uniformly created and securely maintained without such support. It is a Sysiphean

task to *preach* to the strong and powerful not to be powerful. But this is precisely what the preaching of voluntary abstention from every use of force amounts to.

But the principles of the League of Nations also include another idea which is in open contradiction to that of abolishing force. This is the idea of sanctions. For sanctions mean war. The ideological system of the League is therefore characterized by an internal cleavage, which has caused the greatest confusion. People have constantly vacillated between the two standpoints without realising the difference between them. The fruit of their union is the principle of defending peace by going to war.

It was, however, inevitable that the principle of the abolishment of force should be supplemented by the contradictory principle of sanctions. Force could not be dispensed with. Even if we could suppose that the League propaganda could establish as uniform and reliable inhibitions against violence as internal law, force would nevertheless be required. The inhibitions can obviously never be absolute. Cases of violence are bound to occur. For the states to have renounced their means of using force would therefore have meant exposing themselves to the risk of being subjugated by whatever state maintained or resuscitated military power. This

danger would have been all the more imminent since the inhibitions are not in any way so reliable as those against individual acts of murder and robbery. The instinct of self-preservation therefore necessitated the inclusion of force in the system under the name of sanctions.

The result was in no way comparable to the "reign of law" which we find within a state. There we have no such cleavage. Our civil and criminal law is not built on the principle that force should not be used, but on the principle that force must be regularised and used to further common ends. The application of the rules of law through acts of force is therefore not in contradiction with the basis of the system, but in harmony with it, and the acts are carried out without great effort in the individual cases. In the League of Nations, on the contrary, we find at the basis of the system the principle of the abolishment of force. As a superstructure on this basis there is the principle of sanctions. And the application of sanctions requires a maximum of force, since they are to be directed against powerful states.

We can point to no single instance when the collective system has really been applied according to the Covenant, though the occasions for its application have been numerous. (The sanctions imposed against Italy during the Abyssinian

crisis were not at all such as are required by the letter or the spirit of the Covenant.) The reasons for this failure are manifold and to a great extent quite obvious. I should like to point out one of them only.

If sanctions are to be applied regularly in conformity to rules, their application must be entrusted to persons who are not thereby, nine times out of ten, placed in a situation which means a sharp conflict of interests. Their position must, on the contrary, be such that they are personally interested in making the application, and in making it carefully, as is the case with our judges. Far from exposing themselves to any risks in condemning criminals or adjudicating civil cases, they earn their livelihood in this way. But the states of which the infliction of sanctions is demanded are in a very different situation. They are faced with the risk of the heaviest sacrifices conceivable without any sure prospect of a reward. It is utterly futile to expect that any nation, under any circumstances, will take on itself such a burden if this is not felt to be exacted by its own most vital interests. But this means that the sanctions of the Covenant will never be inflicted in deference to its rules. If the sanctions ideology is ever made use of again — and this seems by no means to be excluded at the moment of writing — it will be done in order

to justify a war which the leading powers of the League regard as necessary for reasons totally unconnected with the content of the Covenant. The Law of Nations, the rights molested and the duties imposed by the membership of the League will then be invoked in order to remove the inhibitions against violence, to stimulate feelings of strength and confidence — thus providing the moral basis for the war — and in order to gain allies.

NOTES

A general reference should be made to the following works:

Hägerström: Der römische Obligationsbegriff. I. Uppsala & Leipzig 1927.
— Selbstdarstellung (in Philosophie der Gegenwart in Selbstdarstellungen. Leipzig 1928).
— Inquiries into the Nature of Law and Morals. Transl. by C. D. Broad. Uppsala 1953. Almqvist & Wiksell.

Lundstedt: Superstition or Rationality in Action for Peace? London 1925.
— Die Unwissenschaftlichkeit der Rechtswissenschaft. (Berlin 1932–36).
— Legal Thinking Revised. Uppsala 1956. Almqvist & Wiksell.

p. 18 sequ. The quotations from Kelsen are taken from his essay "The Pure Theory of Law" in the Law Quarterly Review 50,51 (1934, 1935). A comprehensive criticism of Kelsen's theory has been made by Hägerström in the international critical review Litteris 1928.

p. 21. "The Great Mystery". The expression is found in Kelsen's Hauptprobleme der Staatsrechtslehre p. 441.

p. 22. Grotius, De iure belli ac pacis 1,1,10,1: *ius naturale* is defined as "*dictatum rectae rationis, indicans actui alicui, ex eius convenientia aut disconvenientia cum ipsa natura rationali ac sociali inesse moralem turpitudinem,*

aut necessitatem moralem, ac consequenter ab auctore naturae Deo talem actum aut vetari, aut praecipi. Cfr. Hägerström, Nehrman-Ehrenstråhles uppfattning etc. (Minnesskrift ägnad 1734 års lag) p. 597.

p. 23. A few quotations chosen at random concerning the law as the will of the state:

Dernburg, Pandekten I p. 43: "*Das Recht ist der allgemeine Wille*".

Wach begins his famous treatise on the law of civil procedure by defining law as "*der abstrakte, hypothetisch-normirende Wille*".

Binding, Die Normen I p. 185 says expressly: "*Das Gesetz ist der Wille . . .*"

Stark, Die Analyse des Rechts (1916): "*Hegels Satz: das Recht ist der Wille des Staates, gilt als Axiom nahezu des grössten Teiles der heutigen Rechtswissenschaft.*"

Kelsen, Hauptprobleme der Staatsrechtslehre: "*Der Staat will — so ist die allgemein verbreitete Vorstellung — dass seine Untertanen nicht stehlen, betrügen, morden, dass sie empfangene Dahrlehen zurückgeben, den vereinbarten Kaufpreis zahlen, dass sie Steuer entrichten, Militärdienst leisten etc. . . . Dieser auf das rechtmässige Verhalten seiner Untertanen gerichtete Wille des Staates begründet nach herrschender Lehre die Rechtspflichten der Subjekte.*"

Morris R. Cohen, Law and the Social Order (1933) p. 249: "In nearly all modern jural and political discussion that styles itself scientific, law is defined as the will of the sovereign."

p. 32. Hobbes, Leviathan part II, ch. 26,8. A modern example of this theory is the following statement by Kelsen, Hauptprobleme der Staatsrechtslehre p. 202: "*Die Erklärung des Willes seitens des Befehlenden führt nicht direkt zum Willen des Anderen. Sie ist an dessen Intellekt gerichtet, wo sie lediglich die Vorstellung des fremden Willens hervörruft.*"

p. 33 sequ. Austin's definition of a command is mistaken. He says: "If you express or intimate a wish that I shall do or forebear from some act, and if you will visit me with evil in case I comply not with your wishes, the expression or intimation of your wish is a command." The *suggestive* character of the command is overlooked. Instead Austin lays stress on *threats*, which are often added to the command but must be distinguished from the command itself.

p. 65. In American legal thinking several writers, headed by Mr. Justice Holmes and Dean Roscoe Pound, have laid great stress on pointing out that judges, contrary to the old theory, really "make law". The work of Jerome Frank, Law and the Modern Mind (1930) is principally directed to the end of making the process of judicial law-making a conscious one. According to Frank the old point of view is still prevalent: "most lawyers deny the reality of judge-made law" (op. cit. p. 33), i. e. maintain that the rules enunciated by the judges always existed beforehand.

p. 87. As an example of the confusion between the right and the actual possibility of bringing a successful action may be cited the essay "Conditional Rights" by Arthur L. Corbin in the Law Quarterly Review 44 (1928). To begin with the author accurately observes that the current notion of a right implies something mystical. Then he procedes to define what a right really is, or, in his own words, "to reduce Rights to the plane of common experience along with other facts". It is obviously supposed that the rights *are* facts. The question is therefore only to determine what facts they are. The definition reached is the following: "A legal relation between two persons, whether it is the Right-Duty relation or some other, means that on the existing facts we can predict with some degree of certainty what will be the action of organized society with respect to the two persons. — — Both Right and Privilege express juristic

concepts and denote a jural relation, because both, when used with respect to two persons, *are predictions* (my italics) of societal conduct in accordance with a rule of uniformity. — — As defined above, to say that you have a Right against me means that on the existing facts we can predict with reasonable certainty that you can get societal aid to control my conduct."

The identification of *rights* with *predictions* is an obvious mistake. What we mean by a right is definitely not what we mean by a prediction. If different persons made different predictions about the same case, would there be as many different rights? Do the law-givers make predictions about the actions of the judges when they lay down rules about how rights are to be acquired, transferred etc.? Certainly not. They *regulate* the future actions of the judges. Nor do the judges make predictions when they "determine rights". The judgment cannot be a prediction about what the judge is going to do in the case! Without doubt we mean by rights something other than predictions. Perhaps the right may be the *facts* on which predictions of this sort are reasonably based? No. These facts are many and of varying character. They include the content of the law, the facts constituting a legal title, the personalities of the witnesses and judges, the ability of the advocates, the economic position of the parties etc. etc. What we have in mind when speaking about rights cannot be this mass of heterogeneous facts. Actually we mean that the right is *created* by certain facts within this group, viz. those which make up the legal title.

It is not difficult, however, to see what has induced the author to take up the standpoint indicated. It is the fact that a person who according to the content of the law has a "right", is generally able to set the legal machinery in motion to his own advantage under certain circumstances (when the right has been "violated" etc.). This is confused with that which we have in mind when

speaking of rights. Actually we have here to do with two distinct realities, on the one hand the idea of rights, on the other hand the actual situation in the community created by the regular application of the rules of law.

p. 92. The meaning of the theory is that the *rules* are the only reality in the law and that the talk about rights and duties is only, to speak with Fitting, »der verbindende kurze Ausdruck für eine Anzahl nahe zusammenhängender und ineinandergreifender Rechtsvorschriften« (Zeitschrift für deutschen Zivilprozess 13, 1889, p. 44).

p. 105. The current view of the nature of a judgment is expounded e. g. in Borchard, Declaratory Judgments (1934). The author says that a judgment is "a conclusive adjudication that a legal relation does or does not exist. — — It is the final determination of the rights of the parties in an action which distinguishes the judgment from all other public procedural devices to give effect to legal rights" (p. 6 seq.). Many statements to the same effect by judges and legal writers are cited and reference is especially made to Gavit, The Code Cause of Action, 30 Col. L. Rev. (1930) p. 807 for "a convincing exposition of the fact that courts neither create nor enforce rights, but by their judgments certify the fact that rights existed theretofore, merely converting a right theretofore unenforceable into one now enforceable."

Sometimes it is maintained that judgments are *commands*. Thus Morris R. Cohen, Law and the Social Order (1933) p. 240: "These commands are usually addressed in the first instance to certain officials, to the clerk of the court, to the sheriff etc., and direct what the latter should do."

The command theory comes nearer to the truth than the other theory in that it takes cognizance of the imperative element in the judgment. But it is important to distinguish between commands in the proper sense and

imperative expressions of the kind used in judgments, which are "independent imperatives". It is not exact to say that a command is addressed by the judge to the executive official. What the judge really does when giving a judgment upon which execution may (under certain conditions) follow is that he lays down a *duty* for the defendant, imperatively.

Cohen continues: "I can see no merit in Professor Yntema's argument that the judgment of a court is "a judgment and not essentially a command". If the court's judgment sets in motion the sheriff who will attach my goods, then how in the name of the empirical science of law can any one claim that it is not a command?" The answer is, of course, that people may be set in motion by other means than commands. A railway sign-post is not a command to the driver. Nevertheless he adjusts his actions with reference to the sign, because he has been trained to act in a certain way when a certain sign is shown. The sheriff's relation to the judgment is quite similar.

p. 106. The definition refers only to a judgment that contains a real *application* of the law, i. e. conforms to the pattern of the law. There are of course other judgments also. Their character is obviously the same in that they are also imperative statements about rights and duties. Only their relation to the law is a different one. In the text the aim is only to show what the application of rules about rights and duties means and therefore only judgments which contain a real application of the law had to be considered.

p. 109. So-called *declaratory judgments* contain only a declaration of the rights and duties of the parties without any "coercive decree" i. e. without ordering execution in case of non-fulfilment. There is, however, no essential difference between such a judgment and an ordinary judgment in favour of the petitioner. The declarative

judgment implicitly contains a decree about the use of force. It determines the future action of the executive officials, if such be necessary. But the force is held more in the background than usual. A new decree is necessary in order to release the execution. This new decree is, however, based on the declaratory judgment. To cite Professor Borchard: "Should a losing party charged with duties actually prove recalcitrant, it is very simple, in view of the fact that the declaratory judgment is *res adjudicata,* to obtain an ancillary decree upon which a writ of execution may issue" Borchard: Declaratory Judgments (1934) p. 12. — In some cases, e. g. when judgment is given for divorce, the judgment has a peculiar effect of a moral character.

p. 113. A small contribution to the knowledge of the magical basis of property in Roman Law is made in my essay "The Acquisition of Possession in Roman Law" (Lunds Universitets Årsskrift 1938, Lund & Leipzig 1938).

p. 117. The inability of the jurists to conceive a law without rights and duties is well illustrated in a remark made by Professor Allen. Referring to the theories of Duguit and Lundstedt Professor Allen says: "I propose in this lecture to consider two theories, one which holds that law consists solely of duties, and another which holds that law consists neither of rights nor of duties, but of — there I pause; for of what it does consist, in the absence of both these elements, it is not easy to see." (C. K. Allen: Legal Duties, 1931, p. 157.) Cf. Pollock, First Book of Jurisprudence (6th ed., 1929) p. 111: "Law necessarily deals with duties and rights of persons. — — Persons are brought, by the operation of acts and events, into relations with things and with one another: that is to say, relations capable of begetting duties, rights, and claims; *for the science of law regards none other*" (my italics).

p. 142. One reason why the indirect effects of the law are so much neglected is that the connexion between the law and our actions in daily life for the most part is not a direct one. There are generally one or more, often very many, connecting links between them. We do not in ordinary cases learn the law by heart in order to adjust our conduct to its provisions, nor do we every day consult lawyers. The influence of the law reaches us through many other channels. One is education. Another is the press. We learn a great deal about what is permitted and what not through reading the papers. Sometimes propaganda is launched for some new set of rules, e. g. traffic regulations. We also imitate habits that have been developed on the basis of the law. In every trade and industry a great many habits of this sort have to be acquired. We make use of standardised forms for contracts, bills of exchange etc. The channels are therefore numerous.

p. 173. The concept of *power* has not been specifically analysed in the text because this would have carried us too far from the proper subject of the study. I only want to make the following remarks in order to avoid misunderstandings.

We are inclined to think of power as a force residing in a person which compels obedience. But this means turning the matter upside down. Such a conception of power is as absurd as it would be to pretend that little Toomai on the neck of the elephant has within himself a force superior to that of the elephant, enabling him to dominate the animal. The reality, which is the basis of the usual, somewhat mystical conception of power, is the fact that some person, or persons, actually obeys the orders of another person. Without actual obedience, there is no power. Thus power signifies the entire position, a relation between individuals characterised by obedience on one side, to the commands from the other side. For this reason it is precise to speak of *positions of power.*

Thus power for one person is always conditioned by,

or rather implies, an attitude by other persons. Another question is what reasons, what causes, make people take this attitude. One reason may be that the commanding person is capable of exerting a suggestive influence on the others so that they follow him blindly. This situation comes nearest to the popular conception of power. What exists here is, in reality, certain reactions among the obeying persons, caused partly by the actions and qualities of the commanding person, partly by their own qualities, and partly by surrounding circumstances. The qualities in the commanding persons which are here of importance are natural qualities such as courage, intelligence, or a specific intensity of mind. They are obviously entirely distinct from the mystical force which is regarded as the essence of power. They are regarded as a source of power, not as being identical with power itself.

The state organisation consists of a network of positions of power, whose occupants work more or less regularly according to a common system of rules with its centre in the constitution, aiding each other and controlling each other. The power of every member of the organisation is conditioned by a firm attitude in respect of the law and legal decrees on the part of other members. The law-givers would be powerless if the judges did not act according to their laws with great reliability and precision. The power of the judge would vanish if the executive officials did not automatically act in response to the judgments etc. The key-positions containing power, which together make up the power of the state, therefore come into existence only through such firm attitudes among the members of the organisation.

Every instance of the kind of relationship we term "power" is a psychological relation. The lever of power is always a psychological influence of one person on another. This may appear as a frail instrument. In reality, however, its strength is stupendous, given the proper conditions. It is the instrument by which every country

is governed in peace and war, the instrument through which order and security is maintained and through which armies are driven to battle against each other.

In the most simple power-relations the personal element of suggestion is prominent. This element may, however, be reduced, or altogether dispensed with, if the minds of the persons who are intended to obey have been sufficiently prepared. The prototype of such preparation is military drill, which makes the soldiers react almost automatically to the commands of the officers.

In the state organisation preparation of this kind is carried very far, though not always in the military form. It is necessary in order to ensure the working of the machinery. The general security in legal matters would e. g. not be very considerable if the execution of a judgment depended on the personal influence of the judge on the executive officials. The *personal* element is therefore largely replaced by the *form*, and the form is made effective through the training of the officials and their mutual control over each other.

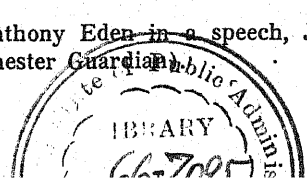
p. 183. Strachey, The Theory and Practice of Socialism (1936) p. 172 sequ.

p. 184. Lenin, Sämtliche Werke XXI (1931) p. 537.

p. 198. Grotius 2,1 2,1: *Quot actionum forensium sunt fontes, totidem sunt belli: nam ubi iudicia deficiunt, incipit bellum.*

p. 204. The dangerous illusion that the Law of Nations is exclusively an instrument of peace has been violently, and with great perspicacity, attacked by Professor Lundstedt in "Superstition and Rationality" etc. and in "Le droit des gens, danger de mort pour les peuples" (Bruxelles 1937).

p. 205. Mr. Anthony Eden in a speech, January 1935 (from the Manchester Guardian).



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